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USING THE COUNTY GENERAL PLAN TO GUIDE HABITAT MITIGATION UNDER CEQA*

Robert A. Johnston**
Mary Madison***

I. INTRODUCTION

"[P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available . . . which would substantially lessen the significant environmental effects."¹

The identification and implementation of mitigation measures is one of the most important issues facing local officials attempting to balance the demands for growth with the requirements of CEQA.² The task is difficult in part because these agencies lack technical expertise³ and in part because measures are determined on a project-by-project basis without comprehensive local guidelines.

A. *The Need to Base Mitigation on Plans*

The identification of mitigation measures is generally not related to the larger natural systems being affected by the

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1. CAL. PUB. RES. CODE § 21002 (West 1986). Specific findings must be made concerning each significant impact, potential mitigation measures for these impacts, and the reasoning behind these choices. See *infra* text accompanying notes 88-115.

2. See generally *infra* notes 111-115.

3. See generally Robert A. Johnston & Wade S. McCartney, *Local Government Implementation of Mitigation Requirements Under the California Environmental Quality Act*, 11 ENVTL. IMPACT ASSESSMENT REV. 53, 53-67 (1991).

"project."⁴ This may cause inefficient and piecemeal resource protection. Moreover, CEQA requires that cumulative impacts of the "project" be assessed.⁵ Development of cumulative impacts on an *ad hoc* basis for each project is not only difficult, but costly.⁶

Studies by the National Research Council have found that project-specific assessments are inadequate for identifying and managing cumulative impacts.⁷ In fact, the National Research Council recommended using regional databases and monitoring for more effective impact mitigation.⁸ Local agencies could develop sufficient databases of environmental systems, projects approved, impacts, and mitigation measures, enabling them to assess cumulative impacts more systematically and efficiently.

In California, the Governor's Growth Management Council has acknowledged this problem of piecemeal mitigation. The Governor's Council recommended the integration of the planning and environmental analysis processes.⁹ The Council urged better practice in the assessment of cumulative impacts, their mitigation, and the use of regional impact significance criteria.¹⁰ The Council also recommended that both local general plans and their Environmental Impact Reports

4. CAL. CODE REGS., tit. 14 §§ 15130(a), 15355(b) (1990).

5. CAL. CODE REGS., tit. 14, § 15130(a) (1990). Cumulative impacts are generally defined as the impacts of "closely related past, present, and reasonably foreseeable probable future projects." REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) 212 (3d ed. 1989).

6. An inventory of present regional species and habitat would provide an existing base from which cumulative impacts could be assessed. Otherwise, the project proponent must investigate the impacts as each project is proposed, incurring costs to collect data or survey areas that could have been assessed collectively more cheaply. Additionally, project proponents may be collecting information that has already been analyzed under another project, doubling costs and time involved in review. Finally, the cost to the environment must be considered. Piecemeal assessment increases the chance that impacts will be presumed insignificant from the single-project perspective, while the collective impacts are actually significant. It is difficult to assess true cumulative impacts without a knowledge of existing resources and all projects impacting these resources within a region.

7. See generally COMMITTEE ON THE APPLICATIONS OF ECOLOGICAL THEORY TO ENVIRONMENTAL PROBLEMS, ECOLOGICAL KNOWLEDGE AND ENVIRONMENTAL PROBLEM SOLVING CONCEPTS AND CASE STUDIES (1986).

8. *Id.*

9. GROWTH MANAGEMENT COUNCIL, STRATEGIC GROWTH: TAKING CHARGE OF THE FUTURE, A BLUEPRINT FOR CALIFORNIA, app. at 47 (1993).

10. *Id.* at 47-52.

(EIRs) address cumulative impacts in detail, as well as addressing the overall impacts.¹¹

This article urges the implementation of these ideas in the area of habitat mitigation by requiring counties to conduct habitat inventories and adopt habitat protection policies in their general plans. These policies would then direct decisions regarding habitat mitigation measures in project EIRs. The need for such policies is demonstrated by a detailed examination of the state regulation of hardwood habitats. First, this article presents an overview of recent developments in habitat protection policy and analysis in California and the nation.

B. *Concern for Habitat Protection*

In March 1993, Bruce Babbitt, United States Secretary of the Interior, announced plans for a National Biological Survey (NBS), which would consolidate research and survey activities of eight federal agencies: The Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, the Bureau of Reclamation, the Minerals Management Service, the Office of Surface Minerals, the Geologic Survey, and the Bureau of Mines.¹² One of the goals of the NBS is giving "land and resource managers more timely, objective scientific information essential for decision-making, [thus] avoiding costs and conflicts such as those involved in several past Endangered Species Act crises."¹³

These kinds of cooperative efforts emerged in Southern California even before the federal government listed the California Gnatcatcher as threatened under the Federal Endan-

11. *Id.* at 18-26.

12. Memorandum from Bruce Babbitt, U.S. Secretary of the Interior, to the President (Apr. 13, 1993) (regarding the creation of the National Biological Survey at the Department of the Interior) (on file with author).

13. Memorandum from Bruce Babbitt, U.S. Secretary of the Interior, to the Secretaries of Agriculture, Commerce, Defense, Energy, State, Transportation, and the Cabinet; the Directors of the Office of Management and Budget, the office of Science and Technology Policy, the Smithsonian Institution, and the Office on Environmental Policy; the Administrator of the Environmental Protection Agency; and the President of the National Academy of Science (March 17, 1993) (regarding the creation of the National Biological Survey) (on file with author).

gered Species Act.¹⁴ Instead of the U.S. Fish and Wildlife Service halting development on gnatcatcher habitat, as required under the Act,¹⁵ California Governor Pete Wilson proposed a cooperative solution. This proposal would allow continued development of regional habitat protection plans under the coordinated supervision of an alliance of developers, state and local government planners, biologists, and environmentalists.¹⁶

California has already begun consolidating environmental research under a statewide coalition of leading state and federal resource agencies.¹⁷ In October 1991, these agencies joined to create a State Biodiversity Council to provide more efficient land management in the state.¹⁸ The agreement emphasizes cooperation among agencies and the establishment of guidelines to protect biodiversity through land management within watersheds.¹⁹

This article proposes legislation that aids in implementing the policies recommended by the Secretary of the Interior, the Governor's Growth Management Council, and the California Biodiversity Council.²⁰ This approach incorporates the county as the focal point, using a county-level biological survey as the basis for habitat mitigation decisions. Because most private lands are within the jurisdiction of counties,²¹ this article suggests that to protect biodiversity successfully in California, standardized practices must be incorporated into county general plans.

14. 16 U.S.C. §§ 1531-1543 (1982). See also Gary Hofer, *A Bird in the Bush Needs a Hand*, 58 AQUEDUCT 12 (1992). Marla Cone, *U.S. Declares Gnatcatcher Threatened Southland Bird*, L.A. TIMES, March 26, 1993, at A1, A28.

15. 16 U.S.C. §§ 1531-1543 (1982).

16. Robert Reinhold, *U.S. Acts to Save Home of Rare Bird*, N.Y. TIMES, March 26, 1993, at A17; Marla Cone, *U.S. Declares Gnatcatcher Threatened Southland Bird*, L.A. TIMES, March 26, 1993, at A1, A28.

17. See *infra* text accompanying notes 26-48.

18. Memorandum of Understanding, California's Coordinated Regional Strategy to Conserve Biological Diversity (Sept. 19, 1991) (on file with author) [hereinafter MOU].

19. *Id.*

20. See app. 2.

21. Telephone interview with Greg Greenwood, Research Manager/Ecologist, Strategic Planning Program, California Department of Forestry, Sacramento, Cal. (Dec. 2, 1993).

C. Overview

This article focuses on a particular habitat type, hardwoods, that generally is found on private lands. The article reviews federal and state laws affecting this habitat type²² and provides a survey of county practices regarding impact mitigation for hardwood habitats.²³ Weaknesses in existing law and mitigation practices are identified.²⁴ Model legislation then addresses these issues.²⁵ The goal of the legislation is to provide for the systematic protection of plant and animal communities through CEQA mitigation while protecting the counties' traditional role of creating and administering land regulation programs within their own jurisdictions.

II. RECENT CALIFORNIA HABITAT PROTECTION POLICIES AND THE NEED FOR LOCAL IMPLEMENTATION

A. *Memorandum of Understanding to Preserve Biodiversity*

In October 1991, several directors of California natural resources agencies and similar federal agency field offices signed a "Memorandum of Understanding" (MOU) in an effort to preserve California's remaining biodiversity.²⁶ Under the MOU, there exist a statewide Biodiversity Executive Council, separate Bioregional Councils for California's designated watersheds, and Watershed and Landscape Associations within each of the bioregions.²⁷ Technical panels are to provide scientific support at the state, regional, and watershed levels.²⁸

22. See *infra* text accompanying notes 54-213 (emphasizing CEQA).

23. See *infra* text accompanying notes 214-229.

24. See *infra* text accompanying note 51.

25. See *infra* app. 2.

26. MOU, *supra* note 18. The signatories of MOU were as follows: California Secretary of Resources, California State Director of the United States Bureau of Land Management, Director of California Department of Fish and Game, Regional Forester of the Pacific Southwest Region of the United States Forest Service, Director of the California Department of Forestry and Fire Protection, Regional Director of the United States Fish and Wildlife Service, Director of the California Department of Parks and Recreation, Regional Director of the Western Region of the United States National Park Service, Executive Director of the California State Lands Commission, and Vice President of the Division of Agriculture and Natural Resources for the University of California. *Id.* at 4.

27. *Id.* at 2-3.

28. State Executive Council, Coordinated Regional Strategy to Conserve Biological Diversity in California: Implementation Plan 5 (Feb. 28, 1992) (unpublished draft, on file with author) [hereinafter Implementation Plan].

The MOU itself provides no legal authority for planning and regulation. Instead, the MOU specifies that the document "does not modify or supersede existing statutory directives of the signatories."²⁹ The bioregional approach under the MOU is voluntary, with agencies executing similar memoranda within their own organizations.³⁰ Thus far, there has been no movement to propose any legislation in conjunction with the MOU.³¹

Under the MOU, the Biodiversity Council sets goals for biological diversity, creates guidelines and standards to meet these goals, helps coordinate the scientific data necessary to most effectively understand and document the issues, and coordinates local and regional groups to implement research and protection strategies.³² Emphasis is placed on the coordination of federal, state, and local agencies in gathering and organizing the necessary biological and land use information.³³ The Council has already begun to implement the policies and principles of the MOU through the encouragement of regional councils in areas such as the Klamath River Basin.³⁴

The first meeting to coordinate the creation of regional councils was held in October 1991 in Redding, California.³⁵ Thirty-five participants, including representatives of the signatory agencies, as well as county supervisors, industry representatives, and environmental leaders, attended the meet-

29. MOU, *supra* note 18, at 2.

30. Implementation Plan, *supra* note 28, at 3; Meeting Minutes of the Executive Council on Biological Diversity, Forest and Rangeland Resource Assessment Program 3, 8 (Dec. 19, 1991) (unpublished material, on file with author) [hereinafter FRRAP Meeting Minutes].

31. Telephone Interview with Mark Hoshovsky, Biodiversity Conservation Planner, California Department of Forestry and Fire Protection (Sept. 1993) [hereinafter Hoshovsky Telephone Interview].

32. Implementation Plan, *supra* note 28, at 1.

33. *Id.* at 1-2.

34. FRRAP Meeting Minutes, *supra* note 30, at 6-7. The Klamath Bioregion Project was initiated by the California Timberland Task Force to coordinate resource conservation activities in northwestern California. The California Resources Agency, the Bureau of Land Management, and the U.S. Forest Service are sponsoring this project and have contracted with the California Institute of Public Affairs to create an outreach effort in this region. *Id.* Similar efforts are reflected in such meetings as the Sierra Summit held in Sacramento, California. Meeting Minutes of the Sierra Summit (Aug. 7-9, 1992) (transcript available from Environment Now, 24955 Pacific Coast Highway, Suite C-201, Malibu CA, 90265).

35. FRRAP Meeting Minutes, *supra* note 30, at 6.

ing.³⁶ In addition to discussing concerns over jobs, the availability of scientific data, and forest overcutting, the participants expressed an interest in collaborative problem-solving and a need to include other organizations and citizens in future meetings.³⁷ It was also agreed that county governments need to play a key role in the process.³⁸

In Southern California, biodiversity protection mechanisms are being tested through a pilot program addressing the threatened California Gnatcatcher in the coastal sage scrub plant community.³⁹ This program incorporates a management system called Natural Community Conservation Planning (NCCP), which creates a system of scientifically based conservation areas managed for ecological values.⁴⁰ Other efforts at coordinated planning are underway in the San Joaquin Valley and the Feather River's east branch of the north fork.⁴¹

Although the MOU champions the need for biodiversity preservation, it lacks the participation of such local entities

36. *Id.* at 6-7.

37. *Id.* at 7.

38. *Id.*

39. *Id.* at 8.

40. The NCCP approach was approved in California Assembly Bill 2172 (filed October 19, 1991). California law authorizes the Department of Fish and Game to enter into an agreement with any person to prepare and implement an NCCP. CAL. FISH & GAME CODE §§ 2800-2840 (West Supp. 1993). These conservation plans can be undertaken independently by federal, state, or local agencies or in cooperation with others. *Id.* § 2820. The goal of NCCP is to conserve long-term viable populations of California's wildlife and their natural habitats. *See id.* § 2810 (historical and statutory notes). Protection of the coastal sage scrub plant community is intended as a pilot example of an NCCP project for the state and nation. A five-member panel of biologists and coastal sage scrub experts will coordinate the collection of data that will be used by the Department of Fish and Game and the U.S. Fish and Wildlife Service to develop planning guidelines. Emphasis is on voluntary coordination and participation of all entities in the affected region. The NCCP planning process is similar to Habitat Conservation Plans (HCPs) authorized under the Federal Endangered Species Act, 16 U.S.C.A. §§ 1531-1544 (1985 & Supp. 1993). HCPs allow the taking of listed species so long as such taking is offset by a coordinated plan structured to preserve and maintain the viability of the endangered species. MICHAEL J. BEAN ET AL., WORLD WILDLIFE FUND, RECONCILING UNDER THE ENDANGERED SPECIES ACT: THE HABITAT PLANNING EXPERIENCE vii-viii (1991).

41. California Dep't of Forestry and Fire Protection, Forest and Rangeland Resource Assessment Program, Examples of Coordinated Strategies to Conserve California's Biological Diversity 6 (undated) (unpublished report, on file with author); Information Subcomm. for the Biodiversity Executive Council, Examples of Biodiversity Projects and Programs Attachment A at A-5, A-6 (Dec. 9, 1992) (unpublished draft, on file with author).

as counties.⁴² Fifty-five percent of California's land base is private land and therefore regulated by cities and counties.⁴³ According to the state's description of the NCCP planning process, now being used in Southern California, local agencies are to be "involved to the fullest extent" and are expected to enact "appropriate local measures to ensure no loss of crucial habitat during the planning phases of NCCPs."⁴⁴ In the first year of its inception, no county supervisors or representatives from the County Supervisor's Association of California sat on the State Biodiversity Council. However, seven County Supervisor's Association members were added in November 1992,⁴⁵ and two local government organization members were added in the Fall of 1993.⁴⁶ Counties are not required to be members of the regional councils, but the Council is increasingly aware of the necessity of cooperation at the county level.⁴⁷ It is unlikely the counties will commit to the regional planning processes unless they have a strong voice early in the process. Implementation of the MOU's goals will be feasible only if counties are involved in this effort from the beginning.

County involvement would be strengthened if counties undertook habitat inventories similar to those done by the federal and state agencies.⁴⁸ One means of increasing county

42. See generally MOU, *supra* note 18.

43. Jones & Stokes Assocs. Inc., California Senate Comm. on Natural Resources and Wildlife, *Sliding Toward Extinction: The State of California's Natural Heritage* 50 (Nov. 1987) (unpublished report, on file with author).

44. FOREST AND RANGELAND RESOURCE ASSESSMENT PROGRAM, CALIFORNIA DEP'T OF FORESTRY AND FIRE PROTECTION, NATURAL COMMUNITY CONSERVATION PLANNING: A PARTNERSHIP TO CONSERVE CALIFORNIA ECOSYSTEMS 3 (1991).

45. Telephone Interview with Janet Cemo, Executive Council Staff Assistant, Strategic Planning Program (Oct. 1993).

46. *Council Adds Representation*, CAL. BIOLOGICAL DIVERSITY NEWS (California Executive Council on Biological Diversity), Fall 1993, at 7.

47. See Hoshovsky Telephone Interview, *supra* note 31. While counties are not required to be on the Regional Boards, the Executive Council is encouraging county involvement. Inquiries regarding issues in areas setting up Regional Boards are directed to members of County Boards of Supervisors to be brought to Regional Boards by the supervisors themselves. The concept of Regional Boards is still in flux, and the Executive Council is trying to demonstrate that Regional Boards are not a new layer of government, but instead are an integration of existing local structures. *Id.*

48. See generally U.S. DEP'T OF THE INTERIOR, EXAMPLES OF RESOURCE INVENTORY AND MONITORING IN NATIONAL PARKS OF CALIFORNIA (Charles Van Riper III et al. eds., 1990); CALIFORNIA DEP'T OF FORESTRY AND FIRE PROTECTION, A GUIDE TO WILDLIFE HABITATS OF CALIFORNIA (Kenneth E. Mayer et al. eds., 1988); Jones & Stokes Assocs. Inc., et al., California Dep't of Forestry and

expertise and motivation would be a state statute requiring studies in each county, along with guidelines that provide a general framework for habitat protection allowing local governments to adapt the policies to their particular regions. These inventories would also increase the effectiveness of cumulative impact assessment and of ongoing project-based habitat mitigation decisions under CEQA, while providing more certainty to project proponents involved in the CEQA review process.

III. LOCAL GOVERNMENT HABITAT PROTECTION PRACTICES

To identify habitat protection needs at the local government level, selected county planning agencies were surveyed regarding management of a specific habitat type.⁴⁹ Hardwoods were studied because in California, this plant community is most in need of protection.⁵⁰ A historical overview of hardwood protection reveals that hardwood loss in California is rising, and effective protection is lacking.⁵¹

Hardwood communities were also chosen because these areas provide significant habitat for California's flora and fauna. The impact of hardwoods destruction extends beyond tree loss to the loss of dependent plant and animal species. In reviewing hardwood issues, a microcosm view of habitat issues in general is presented.⁵² Because hardwoods provide an integral part of wildlife habitat in California, the weak and divergent local approaches used for hardwood protection demonstrate the need for coherent state measures addressing

Fire Protection, A Pilot Study to Identify Habitat Protection Priorities and Develop a Geographic Information System to Evaluate Wildlife Species Richness in California (July 1989) (unpublished report, on file with author).

49. See app. 1.

50. See Jones & Stokes Associates, *supra* note 43, at 66-69.

51. James R. Griffin & Pamela C. Muick, *California Native Oaks Past and Present*, 18 *FREMONTIA* 4, 4 (1990). See also CHARLES L. BOLSINGER, U.S. DEP'T OF AGRIC., *THE HARDWOODS OF CALIFORNIA'S TIMBERLANDS, WOODLANDS, AND SAVANNAS* 1-4, 75, 107 (1988). See also generally Sam Doak et al., California Dep't of Forestry and Fire Protection, *The Legal Environment for Hardwood Land Ownerships in California* 10 (Aug. 1988) (unpublished report, on file with author).

52. Hardwoods are distributed on over 20 million acres throughout California and provide habitat for over 100 species of birds and 60 species of mammals. See California Native Plant Soc'y and Oak Hardwood Policy Comm., *Oak Action Kit: Resources for Preservation and Conservation of Oak Habitats*, § III, at 1-25, § IV, at 19 (Pam Muick & Joan Stewart eds., 1989) (unpublished material, on file with author).

the larger habitat impacts caused by decentralized resource management.⁵³

A. *Hardwoods, CEQA, and the California Department of Forestry*

Hardwoods previously have not been considered valuable as a commercial timber product and therefore have not been included in California's regulatory system governing timber harvesting.⁵⁴ Historically, oak removal was publicly funded on rangelands from 1945 to 1973 through federal cost-sharing programs through what is now the Agricultural Stabilization and Conservation Service.⁵⁵ Such policies were advocated by the California Department of Forestry and by the University of California Extension advisors in order to increase range productivity.⁵⁶

Presently, forest practices in California are governed by the Z'berg-Nejedly Forest Practices Act of 1973 (FPA).⁵⁷ Under the FPA, the Board of Forestry (BOF) must adopt regulations "to assure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish and wildlife, and water resources."⁵⁸

Administrative regulations have been implemented to regulate the preparation and review of Timber Harvesting Plans (THPs).⁵⁹ THPs are subject to CEQA,⁶⁰ and therefore trigger the requirement for Environmental Impact Reports (EIRs) prior to adoption of a plan.⁶¹ An Executive Order made THPs functional equivalents to EIRs under CEQA; thus, THPs must meet CEQA's public notice and review requirements,⁶² and must consider feasible alternatives to the

53. See Zane G. Smith, *California Hardwoods: A Professional Challenge to the Resource Community*, Symposium, MULTIPLE-USE MANAGEMENT CAL. HARDWOOD RESOURCES PROC. 1 (1986). See also generally Symposium, ECOLOGY, MGMT., & UTILIZATION OF CAL. OAKS PROC. (1979).

54. Doak et al., *supra* note 51, at 10.

55. *Id.*

56. *Id.* at 51.

57. CAL. PUB. RES. CODE §§ 4511-4628. (West 1984 & Supp. 1993).

58. *Id.* § 4551.

59. CAL. CODE REGS. tit. 14, §§ 1031-1052.3 (1993).

60. See *Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp.*, 59 Cal. App. 3d 959 (1976).

61. See *id.*

62. CAL. PUB. RES. CODE §§ 4582.3-4582.7 (West 1984 & Supp. 1993).

proposed harvest.⁶³ The THPs are reviewed by an inter-agency team, generally consisting of representatives from the California Department of Fish and Game (CDFG), the Regional Water Quality Control Board, and any affected county planning agency.⁶⁴ This team can propose mitigation measures to reduce the impact of harvesting.⁶⁵

Hardwoods, however, are not covered by these regulations. The FPA governs timber as a commercial product.⁶⁶ Since hardwoods have never been categorized as a commercial species, they lie outside the FPA regulatory scheme.⁶⁷ California's Board of Forestry (BOF) has come under increasing pressure to designate hardwoods as a commercial species so that hardwoods may be better managed and protected.⁶⁸

In fact, the CDFG stated to the BOF that hardwoods "provide critical habitat for many species of California's wildlife" and "excessive harvests" have resulted in "serious detrimental impacts on soil erosion, water quality, and fish and wildlife populations."⁶⁹ In a memorandum to the BOF, the Attorney General's Office stated that the "Forest Protection Act clearly extends to the regulation of hardwood harvesting."⁷⁰ The memorandum noted that the BOF could designate hardwoods as a commercial species and that any land "available for" and "capable of growing a crop" fulfilled the definition of "timberland" under the FPA.⁷¹ Therefore, if hardwoods are to be harvested from such areas, this harvesting qualifies as "timber operations" under the FPA.⁷²

Additionally, a landowner managing timberlands for purposes other than harvesting may file for a timberland con-

63. FOREST AND RANGELAND RESOURCES ASSESSMENT PROGRAM, CALIFORNIA DEPT' OF FORESTRY AND FIRE PROTECTION, CALIFORNIA'S FORESTS AND RANGELANDS: GROWING CONFLICT OVER CHANGING USES 151 (1988) [hereinafter GROWING CONFLICT].

64. CAL. PUB. RES. CODE § 4582.6 (West 1984 & Supp. 1993).

65. GROWING CONFLICT, *supra* note 63, at 152.

66. Doak et al., *supra* note 51, at 10.

67. *Id.* at 10, 13-15.

68. *Id.* See also *infra* text accompanying notes 69-70.

69. Letter from Harold C. Kribbs, Executive Secretary, California Fish and Game Commission, to Dean Cromwell, Executive Officer, California Board of Forestry (Oct. 7, 1986) (on file with author).

70. Memorandum from William D. Cunningham, California Deputy Attorney General, to Harold Walt, Chairman, California Board of Forestry 1 (Jan. 26, 1987) (on file with author).

71. *Id.*

72. *Id.*

version permit and remove the land from the FPA.⁷³ As a result, lands used for range or other uses may be released from the Act.⁷⁴ A recent study notes that "harvest of trees is generally motivated by desires to liquidate capital or to improve asset value, not to engage in sustainable forest management."⁷⁵

Still, the FPA may become a hardwood regulatory system. The BOF has responded to hardwood issues with more studies but no commercial-species designation.⁷⁶ The BOF first organized a task force on hardwoods in 1981.⁷⁷ This task force, the Forest Practice Committee on Policies for Forest Practice Regulation in California Hardwood Types, found that foothill and central coast woodlands were under increased pressure for urban and range use.⁷⁸ The Committee stated there was potential for the BOF to manage these hardwoods.⁷⁹ Shortly thereafter, an Interim Department of Forestry Director proposed an emergency rule regarding hardwood retention to protect wildlife when a THP threatened to take approximately 1,000 acres of black oak, but the rule was withdrawn prior to any hearings.⁸⁰

A second task force was created, which issued a preliminary report in December of 1983. This new Hardwood Task Force recommended that the BOF declare hardwoods a commercial species,⁸¹ but the BOF did not comment on the results. Instead, the BOF has continued to study the issues through University of California research and through Cooperative Extension Service programs, and has sponsored seminars and symposia to centralize the exchange of research.⁸² In 1987, the BOF did adopt an interim non-regulatory policy for hardwoods pending further study,⁸³ and the BOF's Policy

73. CAL. PUB. RES. CODE § 4621 (West 1984 & Supp. 1993).

74. *Id.*

75. Doak et al., *supra* note 51, at 44.

76. See *infra* text accompanying notes 77-86.

77. Doak et al., *supra* note 51, at 14.

78. Committee on Policy Study, California State Bd. of Forestry, Forest Practice Regulation in California Hardwood Types 1-2 (Dec. 1982) (unpublished report, on file with author).

79. *Id.* at 26.

80. Doak et al., *supra* note 51, at 14.

81. Hardwood Resource Task Force, California State Bd. of Forestry, Preliminary Report of the Hardwood Task Force 47-48, (Dec. 6, 1983) (unpublished report, on file with author).

82. See generally *supra* note 53.

83. Doak et al., *supra* note 51, at 15.

Statement stresses continued support of research.⁸⁴ Recently, the BOF decided to spearhead a campaign to educate local leaders and landowners about hardwood preservation,⁸⁵ and to move toward legislative protection if the education program is unsuccessful.⁸⁶

Without a state management policy, hardwoods are a resource highly vulnerable to loss. A number of legal mechanisms exist for local governments to address plant and habitat protection; the primary mechanisms are reviewed below.⁸⁷

B. *Legal Mechanisms for Hardwood Protection*

1. *CEQA: General Requirements*

In 1970, the California State Legislature enacted the California Environmental Quality Act⁸⁸ to force local and state agency decision-makers to consider, evaluate, and promulgate the environmental impacts of proposed projects.⁸⁹ The policies set forth under CEQA include the following: "[T]o take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state [of California],"⁹⁰ to "preserve for future generations representations of all plant and animal communities,"⁹¹ and to "require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality."⁹²

The California Resources Agency issued "Guidelines for Implementation of the California Environmental Quality Act,"⁹³ which provide more comprehensive guidance regarding how and when CEQA is applicable. Pursuant to these guidelines, CEQA's procedural requirements are triggered whenever a public agency is involved in approving a discretionary "project."⁹⁴

84. GROWING CONFLICT, *supra* note 63, at 153.

85. Jim Mayer, *Save Oaks Voluntarily or Face Tough Rules, State Warns*, SACRAMENTO BEE, May 6, 1993, at B1.

86. *Id.*

87. *See infra* text accompanying notes 88-213.

88. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1993).

89. 1 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 20.02[1] (5th ed. 1993).

90. CAL. PUB. RES. CODE § 21001(a) (West 1986 & Supp. 1993).

91. *Id.* § 21001(c).

92. *Id.* § 21000(f).

93. CAL. CODE REGS. tit. 14, §§ 15000-15387 (1993).

94. CAL. PUB. RES. CODE § 21080(a) (West 1986 & Supp. 1993).

The term "project" is broadly construed and includes not only agency-initiated activities, but also any private activities that require the issuance of some grant of authority from a state or local agency, or any activity supported entirely or in part by public monies.⁹⁵ If a project falls within the CEQA definition, it still may be statutorily or categorically exempt.⁹⁶ CEQA does not specifically mention whether cutting hardwoods and changing dry-land pasture to irrigated cropland are exempted under the Act.⁹⁷

Once found to be applicable, CEQA requires that the agency with primary authority over the project be designated to oversee an Initial Study of the project's environmental impacts.⁹⁸ After conducting an Initial Study, if the lead agency determines that the project will clearly have no significant impacts, the agency's CEQA obligations are fulfilled and no further analysis is required.⁹⁹ A Negative Declaration is then filed and is reviewable.¹⁰⁰

If the lead agency conducts the Initial Study and determines through "substantial evidence" that "any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment,"¹⁰¹ the lead agency shall prepare an Environmental Impact Report (EIR) or use a previously prepared EIR that adequately analyzes the project.¹⁰² An agency may propose mitigation measures that reduce the proposed project's significant effects to the point of insignificance.¹⁰³ This modification allows the agency to prepare and circulate a "Mitigated Negative Declaration" instead of a full-blown EIR.¹⁰⁴

If an EIR is required, the lead agency must conduct a thorough environmental review analyzing all significant environmental effects of the project, including cumulative effects,¹⁰⁵ growth-inducing impacts,¹⁰⁶ and significant irrevers-

95. *Id.* § 21065.

96. CAL. CODE REGS. tit. 14, §§ 15260-15329 (1993).

97. *See* CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1993).

98. CAL. CODE REGS. tit. 14, §§ 15051-15053 (1993).

99. *Id.* § 15063.

100. *Id.* § 15070; CAL. PUB. RES. CODE § 21080(c) (West 1986).

101. CAL. CODE REGS. tit. 14, § 15063(b)(1) (1993).

102. *Id.* § 15063(b)(1)(A)-(B).

103. *Id.* § 15070(b)(1).

104. *Id.*

105. *Id.* § 15130.

106. *Id.* § 15126(g) (1993).

ible impacts.¹⁰⁷ A significant effect is defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project,"¹⁰⁸ specifically including effects on flora and fauna.¹⁰⁹ Appendix G of the CEQA Guidelines states that a project will normally significantly affect the environment if it: "Substantially affect[s] a rare or endangered species of animal or plant or the habitat of the species. . . . [It] [i]nterfere[s] substantially with the movement of any resident or migratory fish or wildlife species. . . . [or if it] [s]ubstantially diminish[es] habitat for fish, wildlife or plants."¹¹⁰

Once significant effects are identified, the EIR must identify all feasible mitigation measures that will reduce the significant effects of the project to insignificance.¹¹¹ Under the Guidelines, "mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.¹¹²

Additionally, California adopted mitigation monitoring and reporting requirements as part of the CEQA process.¹¹³ The lead or responsible agency must include a mitigation reporting program when it adopts a Mitigated Negative Declaration or certifies an EIR.¹¹⁴ This law helps to ensure that the mitigation measures proposed are actually implemented and are effective.¹¹⁵

107. *Id.* § 15126(f), § 15127.

108. *Id.* § 15382.

109. *Id.*

110. *Id.* app. G (1993).

111. *Id.* § 15126(c).

112. *Id.* § 15370(a)-(e).

113. CAL. PUB. RES. CODE §§ 21081.6-21081.7 (West Supp. 1993).

114. *Id.*

115. *Id.*

2. CEQA Applied to Hardwoods

Significant hardwood losses in California occur in a number of ways: conversion of hardwood forest land to agricultural land, conversion of hardwood trees to rangeland, conversion of hardwood forest to urban development, and harvesting of hardwood trees for firewood.¹¹⁶ Presently, CEQA applies directly to urban conversion and tangentially to other changes. The application of CEQA could be of greater effect if hardwoods were designated as a commercial species and if more activities affecting hardwoods were included within the definition of "project."¹¹⁷

Even if the change in the use of the land is considered a "project" under CEQA, the impacts to the environment must be deemed "significant" before mitigation is required.¹¹⁸ Conversion of prime agricultural land as part of a project is presumed to be significant.¹¹⁹ Additionally, any substantial disruption to an endangered species or its habitat is also presumed to be a significant impact under CEQA Guidelines.¹²⁰ Legislative efforts to treat certain impacts to agricultural land as "significant impacts" failed when Governor Wilson vetoed Assembly Bill 1979 in 1990.¹²¹

If land is to be subdivided for development, it is automatically considered a "project" for purposes of CEQA.¹²² But status as a project does not mean the lead agency will find significant impacts requiring mitigation measures. Even if the activities are considered a project, and the impacts are deemed significant, the lead agency may still not seek mitigation based on a Statement of Overriding Considerations.¹²³

116. See Doak et al., *supra* note 51, at 9-10, 58; BOLSINGER, *supra* note 51, at 2-3; GROWING CONFLICT, *supra* note 63, at 30. See also Jones & Stokes Associates, Inc., California Dept of Conservation, The Impacts of Farmland Conversion in California 2-31 (Jan. 24, 1991) (unpublished report, on file with author).

117. See generally text accompanying notes 54-86, 119-123, 197, and 211.

118. See *supra* text accompanying notes 108-110.

119. CAL. CODE REGS. tit. 14, div. 6, app. G(y) (1993).

120. *Id.*

121. This bill would have authorized the lead agency to determine a threshold amount above which the conversion of agricultural land would be deemed to have a significant impact under CEQA. CALIFORNIA LEGISLATURE, ASSEMBLY BILL 1979 § 21095(a) (on file with author). In the event no threshold was determined by January 1, 1992, the bill specified that a conversion of more than 100 acres would be presumed to have a significant impact. *Id.* § 21095(b).

122. CAL. PUB. RES. CODE § 21080(a) (West 1986).

123. *Id.* § 21081(c); CAL. CODE REGS. tit. 14, § 15093(b) (1993).

3. Off-Site Mitigation

Based on the concern for mitigation and its enforcement, one useful option is off-site mitigation.¹²⁴ Although available as a means of mitigation, developers generally first opt to mitigate impacts on the site.¹²⁵ Some off-site mitigation is now required, but it is generally limited to wetland impacts.¹²⁶ Under the present Army Corps of Engineers' and CDFG's policies, a developer whose project will destroy wetlands must first try to mitigate the impact on the developed site.¹²⁷ If this is not feasible, the developer must create new wetlands or restore old wetlands of similar quality elsewhere.¹²⁸

In California, wetland mitigation has been the forerunner in utilizing "mitigation banking," in which a developer has the option to pay money into a "bank" instead of restoring or creating wetlands on his or her own.¹²⁹ Under the Guidelines for Mitigation Banking developed by CDFG, qualified land is acquired by a "bank developer," and project proponents are allowed to purchase "mitigation credits" from the bank instead of mitigating the impacts of the project themselves.¹³⁰ The "bank developer" can be any "legal entity empowered to acquire land, to create or restore and maintain

124. See *infra* text accompanying notes 126-136. Under off-site mitigation, the mitigation of impact on hardwoods may be carried out at a location different from the impacted site to allow mitigation pooling from many projects to create large protected areas of hardwoods. *Id.*

125. This is largely because planners themselves encourage mitigation on site. See discussion *infra* part IV.C. In discussions with county planners, the authors found that while most of the counties surveyed would consider off-site mitigation, nearly all saw such practices as being limited to special circumstances. Their concern was that if off-site mitigation is more widely available, developers would simply buy their way out of destroying habitat without adequate assurance of the success of the mitigation site.

126. Telephone Interview with Ronald E. Bass, Vice President and Director of Planning, Jones & Stokes Associates, Inc. (Oct. 1990).

127. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act, Section 404(b)(1) Guidelines (Feb. 1990); California Dep't of Fish and Game, Guidelines for the Establishment and Use of Wetland Mitigation Banks (Nov. 1990) (unpublished draft, on file with author).

128. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act, Section 404(b)(1) Guidelines (Feb. 1990); California Dep't of Fish and Game, Guidelines for the Establishment and Use of Wetland Mitigation Banks (Nov. 1990) (unpublished draft, on file with author).

129. See generally California Dep't of Fish and Game, *supra* note 128, at 2.

130. *Id.* at 3.

wetland habitat upon that land and to operate said land as a qualified wetland mitigation bank."¹³¹ A developer need only purchase the number of credits deemed necessary to properly mitigate the project's impacts.¹³²

The Guidelines for Mitigation Banking address only the establishment of mitigation banks, and neither address how close the banks must be to the impacted area nor require a certain mitigation ratio.¹³³ While mitigation banking is becoming a more recognized option, one CDFG employee stated that the idea of mitigation banking is "fraught with imminent peril."¹³⁴

Presently, there is no required fixed ratio of new wetland to lost wetland that developers must meet in order to comply with mitigation policies. A "no net loss" policy was adopted in 1987 by CDFG under its Wetlands Resources Policy, but the ratio has varied from three-to-one (new-to-old) down to two-to-one presently.¹³⁵ Efforts to codify the three-to-one ratio failed when Senate Bill 344 was vetoed by Governor Wilson in 1990.¹³⁶

4. *Endangered Species Act Protection*

No project proponent, whether a state or another entity, may "take" a state-listed endangered or threatened species unless the CDFG has issued the proponent a permit pursuant to the California Endangered Species Act.¹³⁷ This permitting process is required if a project will impact any state-listed threatened or endangered species, including those listed under the California Native Plant Protection Act.¹³⁸

131. *Id.* at 5.

132. *Id.*

133. Specifics such as proximity to impacted sites, general conditions addressing how mitigation would be handled, and the cost of credits were originally included in the Draft Guidelines, but may not be included in the final version. *Id.* at 5-15. *See also* Telephone Interview with Glenn L. Rollins, California Department of Fish and Game (Oct. 1990) [hereinafter Rollins Telephone Interview].

134. Rollins Telephone Interview, *supra* note 133.

135. Telephone Interview with Demar Hooper, Attorney, Holman, Hackard, & Taylor (Oct. 1990).

136. *See generally* CALIFORNIA LEGISLATURE, SENATE BILL 344 § 1794(b) (1989) (on file with author).

137. CAL. FISH & GAME CODE §§ 2050-98 (West 1984 & Supp. 1993).

138. *Id.* §§ 1900-13.

There are, however, major exceptions under the California Native Plant Protection Act. Under section 1913(a), any agricultural operation, including "the clearing of land for agricultural practices or fire control" is exempt from the Act.¹³⁹ Section 1913(b) excludes timber harvest plans (THPs); mining assessment work; public-service-related work; and private ditch, canal, and right-of-way work from the Act's regulations.¹⁴⁰ Under section 1913 (c), any landowner who is notified of rare or endangered plants on his or her property may impact the species so long as the landowner gives the CDFG ten days' notice.¹⁴¹ This period allows the CDFG time to "salvage" the species.¹⁴² Efforts to reform these broad exclusions have been vehemently opposed, especially by the agricultural industry.¹⁴³

Under the California Endangered Species Act permitting process, the CDFG may require individual mitigation plans before the developer is permitted to go forward with a project that impacts a listed species.¹⁴⁴ Whether off-site mitigation will be used depends on how critically the habitat will be impacted, as well as on the effectiveness of on-site mitigation measures.¹⁴⁵ Although the impact may not necessarily be to the animal or plant itself, the CDFG includes "taking" as destruction of the species' habitat.¹⁴⁶ This broader definition,

139. *Id.* § 1913(a).

140. *Id.* § 1913(b).

141. *Id.* § 1913(c).

142. Telephone Interview with David Showers, Endangered Species Conservation Coordinator, California Department of Fish and Game (Oct. 1990).

143. *Id.*

144. *See generally infra* note 146 and accompanying text.

145. Telephone interview with David Showers, Endangered Species Conservation Coordinator, California Department of Fish and Game (Sept. 1993) [hereinafter Showers Telephone Interview]. There is a growing trend toward using off-site mitigation to create wildlife corridors and preserve larger, unified areas of land. *Id.*

146. If the project has state ties through lead-agency status or permitting, California law allows incidental "taking," which specifically includes impacts to habitat as well as species. CAL. FISH & GAME CODE §§ 2090-2192 (West 1984 & Supp. 1993). If the project has no state ties, then "taking" is permitted only for "scientific, educational, or management purposes." *Id.* § 2180 (West 1984 & Supp. 1993). As part of "management" purposes, the California Department of Fish and Game requires mitigation for impacts to habitats of listed species. Showers Telephone Interview, *supra* note 145. Mitigation management plans are memoranda of understanding with an attached management authorization similar to Biological Opinions used under the Federal Endangered Species Act. Telephone Interview with Craig Manson, General Counsel, California Department of Fish and Game (Sept. 1993) [hereinafter Manson Telephone Interview].

which is followed under the Federal Endangered Species Act, allows the CDFG to require memoranda of understanding incorporating mitigation if the species habitat is destroyed but the species itself is not threatened.¹⁴⁷

If the species affected is federally listed, and the project will adversely impact the species, the standards are more stringent. First, any federal agency with ties to the project (either through permits or funding) must consult the United States Fish and Wildlife Service (USFWS) for a biological opinion regarding whether the impact jeopardizes the species.¹⁴⁸ If the USFWS issues a "jeopardy opinion" stating the species will be adversely affected, then no federal permits or funding will be issued.¹⁴⁹ If the project will impact a listed species, non-federal agencies that receive federal funding or permits must consult with the USFWS regarding the proposed project or risk the loss of federal funds or permits.¹⁵⁰ Private developers whose projects impact a federally listed species and who have no federal ties, through funding or permits, must comply with the Endangered Species Act to mitigate the project's impact.¹⁵¹

The Federal Endangered Species Act provides for the creation of Habitat Conservation Plans (HCPs), which allow developers an opportunity to pay money into a fund to create or preserve habitats elsewhere.¹⁵² In 1991, there were only seven HCPs in the United States approved by the USFWS, five of which were in California.¹⁵³ As of 1993, at least twenty HCPs are in the implementation stages in California.¹⁵⁴ This type of cooperative approach is presently being

147. Manson Telephone Interview, *supra* note 146. See also BEAN ET AL., *supra* note 40 at vii.

148. 16 U.S.C.S., §§ 1536(a)(2), (b), (c)(1) (West 1985 & Supp. 1993).

149. *Id.* § 1536(a)(2).

150. *Id.*

151. *Id.* § 1539(a)(2)(A)-(C).

152. *Id.* See also BEAN ET AL., *supra* note 40, at vii.

153. BEAN ET AL., *supra* note 40, at vii; Telephone Interview with Larry Eng, Environmental Services Supervisor, California Department of Fish and Game (Oct. 1990).

154. Telephone Interview with Gail Kovetich, California Planning Manager, United States Fish and Wildlife Service, (Sept. 1993). Some of these habitat plans are being developed in conjunction with NCCP habitat protection plans and are called "NCCP-HCPs" or just "NCCPs" even though such plans are part of the Federal Endangered Species Act HCPs. *Id.* See also *supra* note 40 and accompanying text.

used to preserve the habitat of the California Gnatcatcher.¹⁵⁵ The California Endangered Species Act does not provide for such a program, nor does it prohibit such an approach.¹⁵⁶

Although oaks are not considered endangered under federal or California listing criteria, the California Native Plant Society has put the Valley and Englemann oaks on its "List Four," a special category for plant species of limited distribution.¹⁵⁷ This means the species are not considered "rare," but they are uncommon enough that their status should be monitored regularly.¹⁵⁸

5. *Agricultural and Range Programs*

As stated above, Federal Agricultural Conservation Programs (ACPs) aided in clearing large acreages of hardwoods in California from 1945 until 1973.¹⁵⁹ Although the ACPs focused on soil conservation and water quality, the programs also funded range improvement, which led to the clearing of approximately 1.9 million acres of oak woodlands in order to increase forage.¹⁶⁰ Since this practice continued for so long, this approach has been deeply entrenched as an acceptable means of range management, and the practice of clearing oak woodland for range use continues today, although it is not as widespread.¹⁶¹

In 1985, owners of seventy-seven percent of California's oak woodlands had livestock grazing on some, or all, of their property.¹⁶² Thus, addressing the present and future of rangelands is critically important to an effective hardwood

155. See *supra* text accompanying notes 14-16.

156. Telephone Interview with Celeste Cushman, Threatened and Endangered Species Program Analyst, California Department of Fish and Game (Sept. 1993). According to Celeste Cushman, the California Department of Fish and Game is already underfunded. If habitat conservation plans were legislatively allowed, the Department of Fish and Game would not have the resources to draft the plans. *Id.*

157. CALIFORNIA NATIVE PLANT SOC'Y, INVENTORY OF RARE AND ENDANGERED VASCULAR PLANTS OF CALIFORNIA 100 (James P. Smith Jr. & Ken Berg eds., special publication No.1 1988).

158. See California Native Plant Soc'y and Oak Hardwood Policy Comm., *supra* note 52, § I at 1.

159. See *supra* text accompanying notes 55-56.

160. See BOLSINGER, *supra* note 51, at 2.

161. *Id.*

162. GROWING CONFLICT, *supra* note 63, at 106 (citing L.P. Fortmann & L. Huntsinger, University of Cal. Coop. Extension, California's Oak Woodlands: Owners, Use, and Management (1985) (unpublished report)).

preservation program. Many ranchers using federal grazing permits under the Taylor Grazing Act¹⁶³ are required to have a private land base.¹⁶⁴ Many of these land bases contain hardwoods. Any increases in the ranchers' permit fees might lead to changes in the private lands, because use of the grazing permits is often essential to maintain the present status of the privately held rangeland.¹⁶⁵ Attempts to increase fees have traditionally incurred strong opposition from the cattle industry.¹⁶⁶

The value of range and pasture livestock production in California, after adjusting for inflation, has dropped fifty percent from 1973 to 1985.¹⁶⁷ Thus, land uses other than grazing have become more attractive. An assessment of existing private rangeland and its economic potential for other uses could offer unique opportunities for hardwood preservation.

Other management devices were created through the Federal Food and Securities Act of 1985.¹⁶⁸ This law affects hardwoods through its conservation compliance or "sodbuster" provision.¹⁶⁹ This provision restricts agricultural production on highly erodible land by requiring approved soil conservation plans for parcels prior to planting new crops or removing perennials.¹⁷⁰ Noncompliance can cause growers to lose eligibility for USDA benefits on all of their land.¹⁷¹ The Food and Securities Act does not apply to permanent crops, such as orchards and vineyards, but tends to discourage converting hardwood land to intensive agricultural use such as growing strawberries.¹⁷²

An existing state and federal program combines local and federal entities to address soil and water conservation issues.¹⁷³ California law authorizes the creation of Resource Conservation Districts, which are local organizations that work with the U.S. Soil Conservation Service to carry out

163. 43 U.S.C.S. §§ 315(a)-(m) (1980 & Supp. 1993).

164. Doak et al., *supra* note 51, at 52.

165. *Id.*

166. *Id.* at 50-52.

167. See GROWING CONFLICT, *supra* note 63, at 200.

168. 16 U.S.C.A. §§ 3830-3847 (Supp. 1993).

169. *Id.* § 3832.

170. *Id.*

171. Doak et al., *supra* note 51, at 53.

172. *Id.*

173. See *infra* text accompanying notes 174-177.

natural resource conservation programs.¹⁷⁴ These districts assume varying roles, ranging from the creation of conservation plans for California Land Conservation Act contracts (in Nevada County)¹⁷⁵ to implementing ordinances that regulate land uses (in Monterey County).¹⁷⁶ However, local political support has been weak, rendering the effectiveness of these districts low.¹⁷⁷

6. Land Conservation Programs

California has been a leader in open-space legislation, beginning with the Scenic Easement Act of 1959.¹⁷⁸ This Act was followed by the Open Space Easement Act of 1969¹⁷⁹ to provide tax incentives for owners keeping parcels locked into certain land uses. The 1969 Act was seldom used due to the passage of the California Land Conservation Act (CLCA), which essentially addresses the same concerns.¹⁸⁰

The CLCA allows cities and counties to appraise lands according to their use values as long as the owners agree, for a prescribed period of time, to keep the lands in open-space uses.¹⁸¹ CLCA contracts apply to open-space lands, and counties are permitted to condition the contracts.¹⁸² The widely varying approaches adopted by different counties make it difficult to draw general conclusions regarding the effectiveness of the contracts.¹⁸³

While CLCA contracts provide economic incentives for owners to keep land in agricultural use, nothing in the Act restricts hardwood clearing.¹⁸⁴ Additionally, Proposition

174. CAL. PUB. RES. CODE §§ 9001(a), (c) (West 1977).

175. CAL. GOV'T CODE §§ 51200-51295 (West 1983 & Supp. 1993).

176. Doak et al., *supra* note 51, at 54.

177. *Id.* at 54-55.

178. CAL. GOV'T CODE §§ 6950-6954 (West 1980 & Supp. 1993). *See also* Doak et al., *supra* note 51, at 55.

179. CAL. GOV'T CODE §§ 51050-51065 (West 1983).

180. *Id.* §§ 51200-51295.

181. *Id.* § 51240.

182. The California Constitution states that any land that is under enforceable restriction may be taxed at its use value. CAL. CONST. art. XIII, § 8 (added 1974). Lands under CLCA contracts are included as those lands under enforceable restriction. *See* CAL. REV. & TAX CODE § 423.3 (West 1987).

183. Telephone Interview with Dale Will, Staff Counsel, California Department of Conservation (Oct. 1990).

184. Doak et al., *supra* note 51, at 58.

13¹⁸⁵ reduced the benefits CLCA contracts provide.¹⁸⁶ Still, CLCA contracts can provide significant financial benefits to agricultural landowners, and more land is under contract now than ever before.¹⁸⁷

The Open Space Easement Act of 1974¹⁸⁸ allowed land that did not qualify for CLCA contracts to be considered under the 1969 Open Space Act¹⁸⁹ and to receive similar benefits. In 1977, the 1974 Act was amended to allow non-profit organizations to accept easements,¹⁹⁰ and this amendment was reconfirmed under the California Conservation Easement Act of 1979.¹⁹¹ Conservation easements were given status as real property interests, transferable and perpetual in duration.¹⁹²

7. *Incentive Programs*

The California Forest Resources Act¹⁹³ provides funds to help private landowners in reforestation, timber stand improvement, and habitat improvement.¹⁹⁴ The funding comes from the State Forest Resources Improvement Fund¹⁹⁵ and provides assistance to qualified landowners whose property contains forested land.¹⁹⁶ The Act is geared toward timber production for harvesting; few landowners with hardwoods use this Act, because they do not view hardwoods as a commercial product.¹⁹⁷ But the expansion of funding, or the BOF

185. CAL. CONST. art. XIII A, §§ 1-6 (adopted 1978).

186. See Doak et al., *supra* note 51, at 59. Since Proposition 13 limited the taxation value of all land in California, the tax differential between restricted and non-restricted land was lessened. However, over time, the differential increases as land is sold and taxed at post-1975 values (which were values set by Proposition 13), so the inducement of CLCA tax savings increases. Telephone Interview with Dale Will, Staff Counsel, California Department of Conservation (Sept. 1993).

187. Telephone Interview with Dale Will, Staff Counsel, California Department of Conservation (Oct. 1993).

188. CAL. GOV'T CODE §§ 51070-51095 (West 1983).

189. *Id.* §§ 51050-51065. See also Doak et al., *supra* note 51, at 56.

190. See Doak et al., *supra* note 51, at 56.

191. CAL. CIV. CODE §§ 815-816 (West 1982 & Supp. 1993). See also Doak et al., *supra* note 51, at 56.

192. Doak et al., *supra* note 51, at 56.

193. CAL. PUB. RES. CODE §§ 4790-4799.14 (West 1984 & Supp. 1993).

194. *Id.* § 4791.

195. *Id.* § 4799.13.

196. *Id.* § 4797.

197. Telephone Interview with Tom Randolph, Deputy Chief for Forest Improvement, California Department of Forestry (Sept. 1993).

designation of hardwoods as a commercial species, could lead to a greater effect on hardwoods under this Act.

The Management of Fish and Wildlife on Private Lands Act¹⁹⁸ allows a landowner or group of landowners to file a wildlife habitat management plan with the CDFG in order to increase wildlife.¹⁹⁹ The landowner then receives a license allowing the taking of designated species under his or her plan.²⁰⁰ The landowner may charge hunters access fees,²⁰¹ and "takes" are permitted outside of regular hunting seasons, so long as they are encompassed within the management plan.²⁰² Participation has been low,²⁰³ and the ranches participating do not contain significant hardwood quantities.²⁰⁴

8. *Other Local Government Tools*

Local land use policies are often adopted in response to local, site-specific problems, while the state seeks to resolve issues on a broader level. County tree ordinances, for example, tend to address certain general issues: (1) erosion, (2) sedimentation, (3) unique ecological resources, (4) habitat, (5) scenic values, and (6) open space needs.²⁰⁵ The ordinances tend to be either specific to a certain area or specific to a certain species of tree.²⁰⁶

All county general plans must include conservation and open-space elements.²⁰⁷ Counties have discretion to require land or easement dedications in subdivisions for parks and schools, the need for which is generated by development.²⁰⁸ The local planning agency is required to provide dedications in subdivisions to allow access to public waterways and coastlines.²⁰⁹ Thus, county planning agencies have the authority to implement certain land preservation policies.

198. CAL. FISH & GAME CODE §§ 3400-3409 (West 1984 & Supp. 1993).

199. *Id.* § 3401(a).

200. *Id.* § 3406(a).

201. Doak et al., *supra* note 51, at 64.

202. CAL. FISH & GAME CODE §§ 3406 (West 1984 & Supp. 1993).

203. In 1991, the California Department of Fish and Game had only 58 participants. Doak et al., *supra* note 51, at 64.

204. *Id.*

205. *Id.* at 23-24.

206. *Id.*

207. CAL. GOV'T CODE § 65302(a), (c) (West 1983 and Supp. 1993).

208. *Id.* §§ 66465-66478.

209. *Id.* §§ 66478.5, 66478.11.

Clearly, there are numerous land use planning tools available, but none seem to address California hardwood loss effectively.²¹⁰ Unless the BOF recognizes hardwoods as a commercial species, management and mitigation is left to other mechanisms, including CEQA and other local government activities.²¹¹ CEQA could be a tool for hardwood protection, but as applied, it does not address clearing for agricultural uses, and hardwood loss may not be considered significant even if clearing is recognized as an impact of the project.²¹² Local governments can pass tree ordinances, but as a recent survey demonstrates, these regulations are generally ineffective in curbing widespread hardwood loss.²¹³

IV. SURVEY OF PRACTICES AND ATTITUDES

With an understanding of the hardwood protection mechanisms available, the article now turns to a County Practices Survey conducted by the authors (Appendix 1)²¹⁴ summariz-

210. Despite the numerous land use control mechanisms in California, hardwood populations are diminishing, and have been diminishing over the last fifty years. BOLSINGER, *supra* note 51, at 73-75.

211. See *supra* text accompanying notes 54-115.

212. See *supra* text accompanying note 123.

213. Research regarding guidelines for local ordinances has been completed in a report for California Department of Forestry and Fire Protection's Urban Forestry Program. BERNHARDT & SWIECKI, GUIDELINES FOR DEVELOPING AND EVALUATING TREE ORDINANCES (Apr. 1991) (on file with authors). Subsequent surveys of California cities and counties by Bernhardt and Swiecki show that of those with ordinances, only 40% considered the ordinance(s) effective in protecting native trees on private property. See BERNHARDT & SWIECKI, THE STATE OF URBAN FORESTRY IN CALIFORNIA - 1992 (Dec. 1993) (on file with authors).

214. Mary E. Madison & Robert A. Johnston, County Practices on Hardwood Preservation (Nov., 1990) (previously unpublished survey attached to current article as Appendix 1, further study results on file with author). While the planners themselves seemed open-minded in their attitudes, many stated that their Board of Supervisors was not. While many of the planners expressed enthusiasm about habitat protection, the constant caveat was that such measures depended entirely upon the tenor of the present Board.

The survey questions were grouped into categories so that several could be addressed under each topic. The questions generally called for a yes or no answer or a similarly closed-ended response, followed by an explanation as to why the planner reached this conclusion. This allowed the planner to fully discuss the rationale behind each answer, thereby providing a better understanding of the forces that shape each county's attitudes and actions. Some questions requested that the planner offer his or her own suggestions as to what might be the most effective method of approaching mitigation. This was helpful in allowing the individual planner to offer personal insights and opinions as to what might work best. This also allowed the planner to be more actively involved in

ing the results from surveying twenty selected counties in California.²¹⁵ Each county has a unique approach to hardwood preservation. The purpose of this survey was to find out how county planning agencies apply the existing laws to hardwood habitat protection, to explore the agencies' attitudes regarding CEQA's effectiveness for this purpose, and to discuss alternative methods of mitigating impacts on hardwood rangelands.

A. *Current CEQA Practices*

1. *Hardwood Conversion to Cropland*

Nearly all of the county planners surveyed (from sixteen out of twenty counties) do not consider the conversion of hardwood rangeland to cropland a "project" under CEQA.

the survey process, inviting a more in-depth exploration of the attitudes and approaches within each county. This approach also created a greater risk of subjectivity in the results, but the use of closed-ended questions initially, followed by the explanation, helped standardize the resulting data.

Twenty-one counties were chosen to be surveyed, and those selected were chosen to represent a broad cross-section of views. Of the 21 counties surveyed, only Stanislaus County did not respond. Thus, the results are drawn from the remaining twenty planning agencies. The 21 counties were chosen based on their geography, abundance of hardwoods, and current regulatory practices. It was intended that the survey be representative of all California bioregions. Some counties were chosen because of their more rigorous hardwood protection policies, while others were chosen because their hardwood policies were less developed. Through such a purposeful sampling, it was hoped that the survey results would represent the divergent views throughout the state regarding habitat management and project mitigation.

The survey questionnaire was mailed in mid-November 1990, and follow-up calls began approximately ten days thereafter, continuing for approximately three weeks. The survey specified that the questions were for the planner's reference only and that the actual responses would be elicited over the telephone.

The phone calls lasted from twenty minutes to one hour, depending upon the planner's availability and eagerness to discuss the questions. Despite the length of the survey (six pages), nearly all the planners called were open to taking the time necessary to respond and were friendly and enthusiastic in their discussions.

It should be noted that there may be some respondent inaccuracy, that the views of one planner may not necessarily reflect those of the entire department, and that there is a subtle tendency for respondents to bias their responses in favor of the interviewer's position, which in this case was toward the preservation of habitat.

215. The counties surveyed were El Dorado, Fresno, Kern, Los Angeles, Mendocino, Monterey, Nevada, Orange, Placer, Riverside, Sacramento, San Diego, San Luis Obispo, Santa Barbara, Santa Cruz, Shasta, Sonoma, Tulare, Tuolumne, and Ventura.

Representatives of six counties stated that they rarely review this type of conversion. However, Santa Cruz, Monterey, San Luis Obispo, and Ventura County planners consider this type of land conversion a "project." Ventura County planners consider the conversion a "project" only if it is within either a Scenic Resource Program Area or a Scenic Highway Overlay Protection Zone. San Luis Obispo County planners consider it a "project" only in the Coastal Zone. Monterey requires a permit for conversion on any previously uncultivated land with a slope of over fifteen percent. Additional incentives, such as tax breaks, were mentioned by planners as mechanisms to help keep these areas protected. But converting oaks to agriculture does not trigger CEQA review in most counties.

2. *Hardwood Harvesting*

Few county planners (from three out of twenty counties) consider the harvesting of hardwoods to be a CEQA "project." Only Monterey, San Luis Obispo, and Ventura County planners term this a "project." Monterey and Santa Cruz County planners consider the harvesting of hardwoods to be a "project" only if the site lies within the Coastal Zone. Ventura County planners require a permit, but no one has ever applied for one. Planners from five counties stated that the situation had never occurred.

3. *Conversion of Hardwood Land to Urban Uses*

All of the county representatives stated that the conversion of hardwood lands to urban use is considered a "project," not because of hardwoods, but because any land conversion requiring a county entitlement triggers CEQA review.

4. *Use of Negative Declarations*

Most conversions potentially requiring an Environmental Impact Report (EIR) go out as Negative Declarations. While the percentages ranged from fifty to ninety-eight percent, most county planners (from eleven out of twenty counties) stated that over seventy-five percent resulted in Negative Declarations. Some county representatives simply could not offer a figure. However, Ventura County was an exception, since planners there noted that few projects went out as

Negative Declarations, because the size of the projects mandated EIRs.

B. Criteria for Determining Impacts to Hardwoods and Habitats

Most counties (thirteen out of twenty) do not use specific criteria to determine the significance of impacts to hardwoods or hardwood habitat. Determinations are usually made on a case-by-case basis, and the factors weighed include the amount cut and the size of the trees involved. Representatives of nine counties consider the CDFG comments to be an important factor regarding impacts to hardwoods as well as other impacts.²¹⁶ This is important to note. Statewide policies may be effectively implemented through CDFG guidance documents, since many counties already rely on this information. Moreover, comments from Extension Farm Advisors were also a factor.

Nine counties were designing or proposing hardwood/oak protection ordinances at the time of the survey.²¹⁷ Some of these counties provide criteria for determining whether or not impacts are significant. For instance, Santa Barbara County has developed an Environmental Thresholds Manual, under which the loss of a native tree may be considered a "significant impact." Tuolumne County uses a County Wildlife Project Manual, providing detailed guidelines for mitigating impacts to wildlife habitats.²¹⁸

While counties tend to have more definite criteria for determining impacts to wildlife habitats, such determinations are also generally done on a case-by-case basis. Here especially, counties tend to look to the CDFG for comments, as well as to specialists such as biological consultants and to published state databases such as the Natural Diversity Database and Department of Fish and Game Deer Herd maps. Orange County is developing a Wildlife Geographic Information System in coordination with the CDFG, the United States Fish and Wildlife Service, and San Diego

216. These counties include El Dorado, Fresno, Los Angeles, Mendocino, Nevada, Orange, Placer, Shasta and Tulare.

217. These counties include El Dorado, Orange, Placer, Riverside, Santa Barbara, Shasta, Tulare, Tuolumne, and Ventura.

218. Stephen L. Granholm, Tuolumne County Planning Dep't, Wildlife Handbook: Tuolumne County Wildlife Inventory and Evaluation Project ch. III, at 7-20 (Nov. 1987) (unpublished report, on file with author).

County. This interaction provides a model for other jurisdictions.

C. Mitigation Methods for Impacts to Hardwoods and Hardwood Habitats

1. Hardwoods

Tree replacement ratios vary widely from county to county (in the nine counties that have them).²¹⁹ Fresno County requires a two-to-one on-site ratio (replacement-to-removal), Orange County requires from one-to-one to fifty-to-one, and Riverside County requires replanting at ten-to-one for trees lost that are over four inches in diameter at breast height. Placer County requires replacement of trees lost over four inches in diameter (one-to-one) and requires that developers pay into a Tree Preservation Fund to pay for off-site planting. Ventura County requires on-site replacement at value equal to the trees lost, as determined by an arborist. Sonoma County has a tree ordinance that protects Valley oaks and other listed native trees over nine inches in diameter by a five-to-one replacement, but this rule applies only in urban areas. Santa Barbara County uses a ten-to-one on-site ratio; San Diego County uses a ten-to-one ratio; and San Luis Obispo County generally uses a two-to-one ratio, but only for what is determined to be an environmentally sensitive site.

Santa Cruz County requires open-space easements or dedications if the buildings are clustered, but is adamant about mitigating only on site. Sacramento County charges sixty dollars for each inch of tree diameter lost and applies this amount toward a Tree Preservation Fund. The project applicant may instead choose to purchase one fifteen-gallon oak for each inch of diameter lost at breast height. Sacramento County's oak tree ordinance requires that any oaks affected by a "project" must be preserved, maintained, or replaced. Monterey County generally requires the State Forester's report recommendations.

2. Habitats

Mitigation requirements for habitat impacts are less specific, but the CDFG's comments, as well as comments from

219. Fresno, Orange, Placer, Riverside, San Diego, San Luis Obispo, Santa Barbara, Sonoma, and Ventura Counties have tree replacement ratios.

the Soil Conservation Service, are considered important. Comments from biologists and other specialists are also considered. A few counties, such as Mendocino, have setback requirements along waterways and extra protection in the Coastal Zone. Such requirements identify environmentally sensitive habitat areas in the county's Coastal Zone, restricting development and requiring buffer zones for such areas. The protected area is designed to create corridors for wildlife and includes sand dunes and waterways for spawning fish. Orange County generally requires open-space easements, and Los Angeles County requires open-space dedications. Tuolumne County has a twenty percent open-space requirement for all projects. This set regulation gives some certainty to the developer while ensuring some environmental protection. Riverside County also requires open-space easements or dedications and generally follows the recommendations of an independent biological expert.

D. *County Habitat and Open-Space Mitigation Policies*

Fifteen of the surveyed counties possess some kind of hardwood protection or habitat mitigation policy.²²⁰ Nine counties require some kind of tree-removal permit requirement, although often this is limited to the Coastal Zone or to a specific municipality.²²¹ Four counties currently have comprehensive oak tree protection ordinances, and nine counties are working on regulations. There is definite movement toward greater regulation of impacts on hardwoods.

Only Shasta, San Luis Obispo, and Santa Cruz Counties have any kind of forest management plan for the county, and Mendocino County is negotiating with the BOF for new county guidelines.

Most counties, with the exception of four, do not have areas specifically designated as open space for hardwoods.²²² Fifteen counties have areas designated for open-space lands or easements. However, in these areas, hardwoods are incidentally, and not specifically, targeted for protection.

Eleven county representatives were familiar with Habitat Conservation Plans under the Federal Endangered

220. See discussion *supra* part IV.C.1.

221. See *supra* note 214.

222. Riverside, San Diego, Sacramento, and Los Angeles Counties have areas designated as open space specifically for hardwoods.

Species Act, but few were familiar with the CDFG's Ranching for Wildlife program.

E. Factors Guiding Mitigation Policies

When asked to rate various environmental factors requiring CEQA mitigation, survey respondents gave "Habitat Value" the highest score and "Economic Value" the lowest marks. Other factors, such as "Scenic, Erosion, Water Quality, Native Plant, and Recreational Values," rated intermediate importance. Additionally, survey respondents mentioned other important values. These included air quality (four counties), historic value (two counties), archeological value (two counties), cultural value (one county), prime timber value (one county), real estate prices value (one county), geological value (one county), and wetland value (one county). Clearly, there are diverse reasons for counties to require mitigation.

F. General Comments on CEQA

In addition to commenting on CEQA, an Orange County representative recommended finding ways to enhance the market value of open space. Other counties suggested doing the same for hardwood areas. A San Luis Obispo County planner stated that counties should evaluate easements and open spaces using hardwoods as primary reasons for such mitigation. The planner added that state regulation of these areas would allow the counties to focus on developing and enhancing the protected resources. Some county representatives felt that they could better protect areas if the state adopted guidelines, instead of first creating policy at the county level. Planners questioned their counties' ability to create and enforce strong guidelines because of opposition to strong protection measures or additional fee requirements from powerful political forces. With state-mandated policies structured to allow variation in each county's approach, county representatives felt that they could create individual plans to protect these resources.

Kern County planners felt that despite the fact that review is conducted on a case-by-case basis, the results are consistent. Tuolumne County planners were happy with their Wildlife Policy Manual and thought it could provide a working model for others. Los Angeles County requires the crea-

tion of Significant Ecological Areas, including areas designated to protect hardwoods. Mendocino County planners recommended identifying significance levels for impacts, so that mitigation would be automatically required.

G. *Discussion of Proposed State Legislation*

1. *General Responses*

In the survey, planners offered a variety of comments regarding the prospect of state legislation requiring county habitat protection plans. Fresno County planners felt that while such plans are effective, a lack of county staff renders state programs difficult to administer. CEQA permits counties to charge all project monitoring costs to developers.²²³ Kern County planners warned against the addition of any new elements to the general plan, and instead recommended working within existing elements. Kern County representatives also stated, along with many other county representatives, that the state makes financial promises that are not kept.

Los Angeles County representatives responded that a state program would provide needed additional leverage to protect resources. Orange County planners echoed this sentiment, adding that the state must develop priorities regarding the prohibition of development in certain areas. Monterey County planners want state guidelines or policy and fewer, or narrower, CEQA exemptions. While Shasta and Santa Cruz County officials want to see state guidelines requiring "no net habitat loss," Tulare and Nevada County officials would like general state guidance for county planners to ensure compliance.

Mendocino County representatives suggest a state habitat preservation statute patterned after the Forest Practices Act, but with more emphasis on enforcement. Such a statute could target specific species with clear, enforceable standards and thresholds, and could give weight to state agency comments, such as the CDFG's. Sonoma, Santa Cruz and San Luis Obispo County representatives want something similar to the use of Timber Protection Zones (TPZ). If areas fall outside of TPZs, San Luis Obispo County officials suggest that counties be mandated to preserve lands analogously to

223. CAL. PUB. RES. CODE §§ 21081.6-21081.7 (West Supp. 1993).

wetlands preservation, where there is a no-loss policy. Monterey County representatives are skeptical about any approach similar to TPZs for two reasons. First, such a program could require excessive county staff time. Second, the county's policies would have to meet with state approval.

Sacramento and Riverside County officials emphasize cooperative agreements between owners and agencies to encourage market incentives for preservation. They also recommend agreements between state and federal agencies. Riverside County has a multi-species plan that coordinates efforts between federal, state, and county agencies. Riverside County officials replied that counties could benefit from knowing how state and federal lands are administered. Further, jurisdictions lack expert guidance to get regional policy overviews. Thus, policy applications are not consistent, and key regulatory elements are sometimes omitted.

San Diego, Santa Barbara, and Fresno County officials all emphasize the need for protection against cutting firewood. Santa Barbara County representatives would like regional boards governing different habitat zones. Shasta County representatives recommend regional carrying capacities for population. Orange County officials recommend regional habitat maps, and considered their Geographic Information System to be a step in the right direction.

Also, Ventura, Nevada, and Shasta County officials emphasize the need to educate planners. Shasta County representatives suggested that planners should have a resource management background, while Ventura County officials believed that education programs are more cost-effective. Many county representatives want access to centralized information before starting their work.

2. *Specific Responses*

Representatives from twelve counties are receptive to revising their general plan conservation elements to include a habitat survey and habitat protection policies. Representatives of four counties would consider doing this under limited circumstances, and representatives of another four counties oppose the idea. Of the twelve counties open to this idea, Tuolumne, Los Angeles, and Orange Counties have already made a similar revision.

Within the four conditional "yes" answers, there was variation. Riverside County officials suggest that all species must be considered, because in examining only certain species or areas, other values are lost. Monterey County officials would revise their general plan conservation element only if the state was prepared to pay the costs and the policy revisions were subject only to local approval. Kern County officials do not want a new element, but would consider revising the existing conservation element. Ventura County officials would consider revising their general plan conservation element if state guidelines were in place.

Of those counties agreeing with the idea of revising their general plan conservation elements, there were further variations. Orange County officials note that the state should enter into a Memorandum of Understanding with the counties to establish guidelines regarding the counties' duties and the state's objectives. San Luis Obispo County officials suggest that the revision should be in the land use element. They reason that the land use element incorporates all other elements, and that all zoning is derived from the land use element.

There were various reasons cited for opposing the revision of the county general plan conservation elements. Fresno County officials feel that the state would never allocate funding, and San Diego County officials fear too many "loopholes." Mendocino County planners simply believe that having policies in the general plan will not guarantee enforcement. Thus, Mendocino County officials recommend additional state policies to back up county-level policies.

3. *Comments on CEQA*

The planners were asked whether CEQA could be strengthened to require more habitat protection. Eight county planners feel that CEQA is not an appropriate vehicle for a state program, nine believe CEQA would work for a state scheme but only under certain conditions, and three are undecided. There is concern over CEQA's many exemptions, its cost, and the leeway it gives to local governing bodies. One county planner stated that Boards of Supervisors will simply misrepresent impacts in order to get projects approved.

H. *Survey Conclusions*

Based upon these survey responses, it becomes clear that there is a need for more coherent management of California hardwood habitats. Problems are evident after evaluating the county surveys. Hardwood rangeland conversion to agricultural use and the harvesting of hardwoods are not usually mitigated under CEQA, or even recognized as impacts in some counties.²²⁴ Over half of the county planners surveyed stated that potential EIRs involving hardwood protection generally go out as Negative Declarations. This means that clearing is not recognized as having an impact. Habitat values are listed as the number one factor affecting mitigation,²²⁵ yet the survey results indicate that hardwood habitats are being lost because certain activities affecting them are unregulated.²²⁶

The majority of counties surveyed do not have specific criteria to determine the significance of impacts to hardwoods. Case-by-case review leads to subjective decision-making, which can be founded more on local politics than on biological determinations. Nearly fifty percent of the counties surveyed rely upon CDFG comments and are interested in guidelines that provide consistency in determining mitigation. The issue here is how to balance the need for consistent standards against the needs of counties to make determinations appropriate to their own regions.

These surveys expose inconsistencies in how counties approach hardwood habitat protection. There is little networking of existing ideas among planning departments, and many planners express great interest in more education and coordination among involved agencies. Several counties have manuals and ordinances that could provide resources to other counties, yet there is no information shared among the counties.

Counties are fiscally strapped and will oppose statutory changes that impose data-gathering requirements without

224. See *supra* part IV.A.1.

225. See *supra* note 214.

226. The survey demonstrates that hardwood conversion to agricultural land is generally not considered an impact, harvesting of hardwoods is largely unregulated as an impact, and generally counties do not have developed criteria to determine impacts to hardwoods. See discussion *supra* parts IV.A.1, IV.A.2, IV.B.

additional funding. Planners are leery of state promises, which may remain unfulfilled. Any coordinated program must carefully examine financial support methods as a key to its success. It is essential to recognize the potential for cost savings by developing habitat inventories and protection guidelines. However, the EIR process can be tiered, based on the General Plan EIR, and the developer then enters into the environmental review process with greater certainty as to mitigation requirements.²²⁷

As a result of this research, habitat protection legislation was drafted that incorporates the concerns of the surveyed county planners and provides the needed data to preserve habitat diversity in California. In general, the counties would like funding and guidance, along with the ability to retain a large measure of local authority.

Planners are wary of new laws that could increase demands on their financial resources. Thus, the logical approach is to implement a habitat protection plan through an existing statute, such as the Local Planning Act.²²⁸ Such an approach will not disrupt existing protection mechanisms, but will enhance them, allowing a standardized procedure with substantive flexibility for each county.

The proposed legislation is designed to require that county planners set mandatory habitat protection policies in their general plans and use those policies to control the CEQA mitigation process. Such a policy framework will permit the mitigation of cumulative impacts, replacing the piecemeal on-site project mitigation process now employed.

227. With a master EIR in place (done by the county) and mitigation guidelines, the developer enters the mitigation arena with a general knowledge of the environmental issues outlined in the master EIR and of what will be required to mitigate impacts. The environmental review is limited to whatever additional impacts are introduced by the proposed project, as referenced by the master EIR. Because mitigation has already been outlined and addressed, the developer may even be able to contribute to existing mitigation activities instead of creating separate, piecemeal mitigation. This contribution might be in the form of mitigation banking, or adding funds toward current measures, but whatever the result, the project proponent has an idea beforehand of the likely impacts and costs.

228. CAL. GOV'T CODE §§ 65100-65763 (West 1983 & Supp. 1993).

V. PROPOSED PLANT COMMUNITY AND WILDLIFE HABITAT PROTECTION LEGISLATION

A. *Introduction*

The underlying intent of the proposed legislation (Appendix 2) is to require counties to create enforceable plant and wildlife habitat protection plans without too many substantive requirements. These plans are state-funded (\$12 million).²²⁹ The General Plan component is tied to CEQA and requires an implementation analysis. Guidelines are to be adopted by the Resources Agency and are presented in bold type as part of the legislation (Appendix 2). Many of the ideas come from the Tuolumne County Wildlife Handbook²³⁰ and from the interviews with county planners.

B. *Policy*

There is a critical need to protect all habitats important to state and federally listed plants and animals. Coordinated biological surveys allowing counties to inventory existing resources are lacking.²³¹ Such an inventory is necessary for implementing effective mitigation and determining thresholds of significance.²³² With a resource database and protection policies in place, the developer gains more certainty in the review process while the preservationist is assured that standards have been set and must be met before development occurs.

The signing of the MOU by the state and federal agencies signifies an effort to address resource needs on a bioregional

229. Despite the current fiscal situation in California, alternative methods of front-end financial support for habitat inventory remain viable. Such options may include funding districts similar to those used to provide education. The challenge is to estimate the costs accurately so that counties are recouping the true value of their time. This would be accomplished by charging mitigation fees through the mitigation process at a later date, based on the habitat inventory and guidelines.

230. See generally Granholm, *supra* note 218.

231. See discussion *supra* note 214. The survey of counties demonstrates the wide variations in practices regarding habitat protection. There was a lack of coordinated methods that allow scientific data and references to be shared between counties.

232. Impacts cannot adequately be assessed if there are not sufficient data on the resources that are impacted. With coordinated scientific referencing systems and guidelines, adequate information regarding resources may be compiled so that responsible mitigation can be implemented.

basis instead of addressing a single species at a time.²³³ An awareness of the usefulness of this approach sets the foundation for integrated approaches to restoration and mitigation. Such goals require greater communication between all parties involved in resource management and a sharing of existing knowledge, which the above survey demonstrates is both needed and desired by the counties. The recommended inventory enhances decision-making regarding the impacts of development, and the standardized biological language helps different counties within the same bioregion coordinate a geographic examination of their resources. Agencies can share management efforts for more efficient resource protection while expediting the development and mitigation process.

C. *Implementation*

The legislation requires that each county, by a specified date, add a Plant Community and Wildlife Habitat Component to the existing Conservation Element of its General Plan. The inventory applies only to non-federal lands not incorporated in cities, although using information from those sources is encouraged. The state supplies funding as long as the component is completed by a specified date. Funding is based upon a fixed amount plus an additional amount per square mile of private land. The component must be designed by biologists and must consider comments by the CDFG, the USFWS, the Natural Diversity Database, and the CNPS.

An Environmental Impact Report will be prepared on the component and will be funded by the state, if completed by a specified date. If the component is submitted to, and approved by, the CDFG, impacts complying with the component and EIR will be considered insignificant under CEQA. Subsequent revisions will require additional comments by the CDFG. Any addition of a state or federally listed species would be an amendment to the component and would require approval by the CDFG.

All unincorporated land would be inventoried and categorized according to five defined habitat types defined by the CDFG's Wildlife-Habitat Relationship System.²³⁴ Priority

233. See *supra* text accompanying notes 26-41.

234. See CALIFORNIA DEP'T OF FORESTRY AND FIRE PROTECTION, A GUIDE TO WILDLIFE HABITATS OF CALIFORNIA 7-8 (Kenneth E. Mayer & William F.

categories for plant and habitat protection are listed, using the defined area types, including goals and permissible uses within those areas. Guidelines for mapping criteria, reference files, and distribution files are also included.

The county would draft an Action Plan implementing the inventory and consequent land use policies. The legislation discusses various restoration and mitigation alternatives, including off-site mitigation, transferable development credits, and land banking programs with permanent enforceable restrictions. Guidelines with greater specificity would be drafted by the counties to address the use of these and other suggested programs.

The Legislature would establish a Plant Community and Wildlife Habitat Program in the State Resources Agency to reimburse counties for the costs of preparing the new component and EIR. This fund would also provide money to the CDFG for commenting on these components.

D. Additional Legislative Changes

In addition to adding the Habitat Component to the general plan, there are several other areas in the law that must be strengthened to improve habitat protection under CEQA. If mitigation is to be effective, certain activities need to be included as "projects" to trigger CEQA review. Revising other statutes that have significant effects on habitat protection in California is also recommended.

Changes regarding the definition of "project" in CEQA are recommended to include 1) parcel splits, 2) agricultural conversion from dry grazing to cropland, and 3) hardwood harvesting. These are all activities that are not usually subject to CEQA but that cumulatively have substantial impacts on biodiversity in California.

The BOF should define hardwood species as a commercial species, so that Timber Harvest Plans are done and the environmental impacts are evaluated and integrated. The strengthening of California's Native Plant Protection Act is also recommended. A narrowing of existing exemptions, including the exemptions for agricultural clearing and for Timber Harvest Plans, plus stronger policy language and enforce-

ment mechanisms, could make this act much more useful in plant community preservation. Additionally, large-scale protection plans similar to HCPs under the Federal Endangered Species Act should be encouraged under the California Endangered Species Act.

VI. CONCLUSION

All of these statutory changes are needed to help fulfill the habitat protection needs of counties, the objectives of CEQA, and the goals of the Biodiversity Council. The Council plans to protect habitats using existing California statutes, but the authors question whether these statutes are adequate for the task. The above surveys of California law and of county practices reveal weaknesses in these laws. The California Legislature should remedy the weaknesses in the various underlying statutes. These statutory changes will improve habitat protection and reduce the cost of project review.

APPENDIX 1

	Hab	NtvPI	Erosn	WatQ	Scen	Rec	Econ	Hist	AirQ	Other
El Dorado	4.0	4.0	4.5	3.0	3.0	4.0	4.0	0.0	5.0	0.0
Fresno	4.0	3.0	3.0	5.0	2.0	3.0	3.0	0.0	0.0	0.0
Kern	4.0	4.0	2.0	4.0	2.0	3.0	3.0	0.0	0.0	0.0
Los Angeles	4.5	4.5	3.0	2.0	5.0	4.5	1.5	0.0	0.0	0.0
Mendocino	4.0	3.0	4.0	3.5	2.0	1.0	1.0	0.0	0.0	0.0
Monterey	4.0	3.0	5.0	4.0	5.0	2.0	2.0	3.0	0.0	0.0
Nevada	3.0	2.0	1.0	4.0	2.0	3.0	3.0	3.0	3.0	3.0
Orange	5.0	5.0	5.0	4.0	3.0	3.0	5.0	0.0	5.0	3.0
Placer	3.0	4.5	3.5	5.0	4.0	4.0	1.0	0.0	0.0	3.0
Riverside	3.5	3.5	3.0	2.0	2.5	3.0	3.0	0.0	0.0	3.0
Sacramento	5.0	5.0	5.0	5.0	4.0	3.0	0.0	0.0	0.0	0.0
San Diego	4.5	4.0	3.5	3.0	3.5	3.5	2.0	0.0	0.0	0.0
San Luis Obisp	4.0	4.0	5.0	3.0	5.0	2.0	2.0	0.0	0.0	0.0
Santa Barbara	5.0	5.0	3.0	4.5	3.0	2.0	1.0	0.0	0.0	0.0
Santa Cruz	5.0	5.0	5.0	4.0	5.0	3.0	2.5	0.0	0.0	0.0
Shasta	5.0	2.0	5.0	5.0	2.0	4.0	3.0	4.0	0.0	0.0
Sonoma	5.0	4.5	4.0	5.0	4.0	3.0	2.0	0.0	0.0	0.0
Tulare	4.0	4.0	3.5	3.0	3.5	2.0	5.0	0.0	0.0	3.0
Tuolumne	5.0	5.0	2.0	2.0	5.0	5.0	2.0	0.0	0.0	0.0
Ventura	4.0	4.0	5.0	4.0	5.0	4.0	1.0	0.0	0.0	0.0
Total	85.5	79.0	75.0	75.0	70.5	62.0	47.0	10.0	13.0	15.0
Average	4.3	4.0	3.8	3.8	3.5	3.1	2.4	0.5	0.7	0.8

APPENDIX 2

PROPOSED PLANT COMMUNITY AND WILDLIFE HABITAT
PROTECTION LEGISLATION

Intent: To require counties to create enforceable Plant and Wildlife Habitat Protection Plans without too many substantive requirements. State-funded (\$12 million). General Plan component tied to CEQA. Require implementation analysis. Guidelines to be adopted by Resources Agency or by private organization (Trust for Public Land, The Nature Conservancy, etc.)

Note: The proposed statutory language is in regular type and the guidelines are in bold type.

State Policies:

1. There is a critical statewide need to protect all habitats important to state and federally listed plants and animals (lands, waters, and plants on which these species are dependent at any life stage). The allowable land uses in these habitat areas shall, whenever feasible, be restricted to uses that have no adverse impact upon the habitat or listed species. Land uses in surrounding areas shall also be controlled, where feasible, to ensure the preservation of the habitat and species.

2. There is also a need to protect: large habitat areas for fish, raptors, and large mammals and for wildlife species given special status in each county; habitats that are relatively rare in each county; and other habitats essential for maintaining diverse and abundant plant communities and wildlife throughout each county. These areas shall include wetlands, estuaries, riparian areas, sand dunes, vernal pools, native grasslands, and other areas deemed especially rare and vulnerable to human impacts. Uses in these areas will be determined on a case-by-case basis, following the mitigation requirements set forth herein, in addition to the mitigation requirements of CEQA and subsequent court decisions.

3. It is desirable to protect other habitat areas that are of considerable value to plant communities and wildlife. Land uses will be permitted in these areas with appropriate enforceable conditions imposed on them as mitigation measures as set forth herein and as required by CEQA.

4. There is a need to maximize the mitigation of plant community and wildlife habitat loss by allowing the pooling

of project mitigation through the use of project fees and marketable mitigation credits, in order to protect these areas.

5. This Act strengthens the implementation of the Federal Endangered Species Act and California Endangered Species Act by requiring the systematic inventory of rare plant communities and wildlife habitats by all counties and the prioritization of protection measures for such lands under CEQA.

State Policies Applied:

1. Each county will add a Plant Community and Wildlife Habitat Component (Plant and Wildlife Component) to the Conservation Element of its General Plan by December 31, 1997. This component will not include lands in incorporated cities or federal lands, but will utilize inventories from these jurisdictions, if available. The State Department of Fish and Game will pay for the creation of the Plant and Wildlife Component if work is commenced by July 1, 1995. Payment to each county will consist of \$100,000.00, plus \$10.00 for each square mile of private land area in the unincorporated portion of the county.

2. Each county will use biologists in designing the Plant and Wildlife Component and will consult with the State Department of Fish and Game and the United States Fish and Wildlife Service during the creation of the wildlife portion of the Plant and Wildlife Habitat Component. Each county will consult the Natural Diversity Database and the state and local chapters of the California Native Plant Society during the creation of the Plant Communities portion of the Plant and Wildlife Component.

3. An Environmental Impact Report (EIR) will be prepared on the Component. The State Department of Fish and Game will pay for the EIR if work is commenced by July 1, 1995. The State Department of Fish and Game must comment on the draft EIR within sixty (60) days. The county will respond to the State Department of Fish and Game's comments before adoption of the component.

4. As part of the Plant and Wildlife Component, each county will adopt plant community and wildlife habitat protection policies that can be implemented through CEQA and through other means such as planning and zoning. These policies must comply with the above State Policies, as well as the policies set forth below, and with county priorities.

Implementation Procedures:

1. An inventory of all lands in the county will be performed. The Inventory will:

a. Identify and map five types of areas: Common Habitats, Target Habitats, Target Use-Areas, Rare Plant Communities, and Common Plant Communities (defined below).

b. Use habitat definitions from the California Department of Fish and Game Wildlife Habitat Relationships program and plant community definitions from the Preliminary Description of Terrestrial Natural Communities of California, except in cases where such definitions are determined to be inappropriate.

c. Use the best available information from all sources, including the County Planning Department, local residents, outside experts, aerial photographs, state and federal agencies, the California Native Plant Society, and the Natural Diversity Database.

d. Specify allowable land uses, conditional land uses, and land development policies for each type of area identified.

e. **Create threshold mapping criteria, based on species and habitat area requirements, for Common Habitats, Target Habitats, Target Use-Areas, Rare Plant Communities, and Common Plant Communities.**

f. **Create site-specific designations on detailed (scale) maps useful for general and specific planning.**

2. Subcategories may be created, if needed, for local plant and animal species or areas.

3. The Plant and Wildlife Component will be implemented through an Action Plan. The Action Plan will:

a. Designate mapping procedures for Rare Plant Communities, Common Plant Communities, Common Habitat Areas, Target Habitat Areas, and Target-Use Areas. **Mapping will be based on aerial photo-interpretation and sufficient ground-truthing to ensure reasonable accuracy. Area designations may include patch evaluations in the field. Such evaluations will note 1) location, size, and elevation of patch; 2) habitat characteristics, including tree layer; 3) evidence of prior human disturbance; 4) potential for future human distur-**

bance; and 5) overall area quality, based on a comparison of the site with the optimal condition of that area type in the county.

b. Provide for the creation of Wildlife Reference files, which will contain references on each Target Species, Target Habitat, and Common Habitat, as well as more general files on wildlife biology, management, and planning.

c. Provide for the creation and expansion of Target Distribution files, which will include distributional data on each Target Species and Target Habitat. **These files will document the reported locations on public and private lands in the county or on nearby lands or bodies of water. The Distribution file will contain an Update section, which will include all new distributional data on Target Use-Areas and Target Habitats.**

d. Provide for the creation of a Plant Community Reference file, which will contain references on Rare Plant Communities and Common Plant Communities, as well as more general files on plant community biology and management.

e. Provide for the creation of a Plant Community Distribution File, which will include distributional data on each plant community. **These files will document the reported locations on public and private lands in the county or on nearby lands. The Distribution file will contain an Update section, which will include all new distributional data on Rare and Common Plant Communities.**

f. Using information from the Land Use Element of the General Plan, provide a detailed analysis of the county's General Plan buildout. **The buildout analysis will estimate lands protected through zoning and other regulations, on-site dedications, and off-site dedications. In addition, using existing mapped information and state population projections, a general analysis will be made of development patterns and their effect on plant communities and wildlife habitats for fifty (50) years.**

4. The county may apply project fees to off-site habitat or plant community purchases, or to the purchase of development rights, as necessary to implement the county's Plant and Wildlife Component. Fees must be related to the size and quality of areas destroyed or impaired by projects.

5. The county may develop a program for the banking of lands and easements by public agencies or suitable nonprofit organizations, paid for with fees from individual projects. These lands must have permanent restrictions on their uses that meet the requirements of the component.

6. The county may develop a program for the restoration of damaged habitat or plant community areas. Restoration may count as mitigation for projects on-site or off-site, taking into account the probability of success of the restoration and the lower quality of habitat or plant community that may result, compared to the original area that will be degraded.

7. The county may develop a program for the private transfer (sale) of mitigation credits between landowners in order to protect large land areas. Such a program may apply to all land development projects in the county. Counties may cooperate with land trusts and other private organizations that are attempting to acquire, protect, and improve important plant and wildlife areas. Counties may coordinate with other counties and cities in such a program to protect large habitats. **Counties may coordinate with the County Assessor's Office and seek reductions of property taxes for areas preserved for plant species or wildlife. These tax revenue losses may be compensated for with fees on new development.**

8. Counties may use general plan amendments and zoning to retain important wildlife habitats or plant communities in large parcels.

9. When funding is available, the county may acquire important plant and wildlife areas on a willing-seller basis. This can include outright purchase, land donations, trades, purchases of easements, and related options.

10. The county may develop programs for owners of identified Target Habitat or Rare Plant Community lands that will increase income-producing compatible uses. If such owners restore or increase habitat or plant values, they can sell mitigation credits in the county as determined by county policies.

11. Rare Plant Community and Wildlife Target Use-Area Maps should be updated at least once a year. If budgets permit, the mapping of Common and Target Habitats and Common Plant Communities should be

updated every five years. The lists of Target Use-Areas, Target Habitats, and Rare Plant Communities will be periodically reviewed and updated, at least once a year, to determine whether there should be additions or deletions. A more extensive review will be conducted every five years.

General Plan Compliance:

1. Priority categories for plant and wildlife protection shall be as follows:

a. First-Priority Areas are Plant Community Areas and Target Use-Areas for species listed as threatened or endangered by the state or federal governments, and include areas important for maintaining a species' current population level in the county.

b. Second-Priority Areas include 1) Plant Community Areas and Target Use-Areas for other plant and wildlife species that are rare in the county, 2) the most important Plant Community areas and Target Use-Areas for species that are not rare in the county, and 3) all other Target Habitats and Plant Communities that are deemed essential for maintaining diverse and abundant plant and wildlife areas in the county.

c. Third-Priority Areas include 1) Common Habitats and Plant Communities that are of considerable value to wildlife and 2) Target Use-Areas for animals that are not rare in the county (except Second-Priority Areas).

d. Fourth-Priority Areas include Common Habitats and Plant Communities that are of relatively low value to plant and wildlife diversity in the county (as defined by each county).

2. A central goal of plant and wildlife mitigation in each county will be to pursue a consistent, fair, and cost-effective approach to mitigation that provides the greatest protection for the most sensitive species and habitat resources. Goals for the four priority categories will be:

a. To provide the greatest possible protection for First- and Second-Priority Areas, maintaining or enhancing their present value to plants and wildlife.

b. In Third-Priority Areas, to avoid impacts to the maximum extent possible; to minimize or compensate for unavoidable significant impacts; and to encourage voluntary efforts to enhance such areas for plants and wildlife.

3. Counties may permit nonconsumptive uses of the resources in Target Use-Areas and Target Habitats if these uses will not impair in any way the habitat's long-term usefulness to state and federally listed plant and animal species.

4. Each county will attempt to maintain a continuous network of valuable wildlife habitats throughout the county by providing connected tracts of high-quality habitat.

CEQA Compliance:

1. The county will adopt mitigation measures under its Action Plan that comply with the provisions of CEQA and subsequent court rulings. These mitigation measures will therefore address significant impacts from projects, including impacts that substantially affect rare or endangered plant or animal species or their habitats. Under CEQA, each county is required to determine whether any projects in its jurisdiction will have a significant impact on the environment. A significant effect is defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project," specifically including effects on flora and fauna (CEQA Guidelines Section 15382). Appendix G of the CEQA Guidelines states that a project will normally have a significant effect on the environment if it will: a) "Substantially affect a rare or endangered species of animal or plant or the habitat of the species;" b) "Interfere substantially with the movement of any resident or migratory fish or wildlife species;" or c) "Substantially diminish habitat for fish, wildlife or plants." Section 15065 of the CEQA Guidelines requires a finding of significance if a project has the potential to "reduce the number or restrict the range of a rare or endangered plant or animal." By "rare or endangered," CEQA means any plant or animal that is actually rare or endangered throughout all or a significant portion of its range, even if it is not officially

listed as rare, threatened, or endangered (Section 15380). In such cases, CEQA requires mitigation of the impacts through avoiding the impact, minimizing the impact, rectifying the impact, reducing the impact, or compensating for the impact (CEQA Guidelines section 15370).

2. Mitigation measures, including mitigation credits, must be permanent and enforceable. Mitigation measures will be adopted at the time of the parcel split or the subdivision permit or the rezoning, whichever occurs first. Mitigation measures may also include the sale and dedication of permanent and enforceable development easements to the county. To ensure that all mitigation measures for a project are actually implemented, mitigation measures will be incorporated into development agreements, use permits, permanent easements, or other permanent enforceable documents, and such restrictions shall be recorded against the title to the land. **The county will require performance bonds or other security and will impose fines or other penalties for violations of mitigation agreements. Whenever feasible, off-site mitigation measures must result in the protection of large Target Habitat or Rare Plant Community areas. Counties should maximize the use of fee simple purchase and the acceptance of land dedications.**

3. Counties may do a focused EIR on the revisions to the Conservation Element of the General Plan. The state will pay for these EIRs if work is commenced by July 1, 1995. **If the revised Conservation Element is submitted to, and approved by, the State Department of Fish and Game, impacts to plants and wildlife in projects complying with the Conservation Element policies and plant and habitat protection maps will be considered insignificant under CEQA. The addition of state or federally listed species after the Conservation Element is approved will require an amendment to the Conservation Element and approval by the State Department of Fish and Game in order to keep this CEQA streamlining policy in effect in the county. Counties that have sought and received approval of their Components by the State Department of Fish and Game must submit all draft General Plan revisions or proposed General**

Plan amendments to the Department of Fish and Game for comments, if such revisions or amendments could affect any of the areas contained in the Conservation Element. The State Department of Fish and Game must respond within sixty (60) days.

4. The Legislature establishes a Plant Community and Wildlife Habitat Program in the State Resources Agency with dedicated funds. Eight million dollars (\$8,000,000.00) are set aside for reimbursing the counties for preparing the Plant Community and Wildlife Habitat Components and EIRs on them. Two million dollars (\$2,000,000.00) are given to the State Department of Fish and Game for the purpose of CEQA commenting on large local projects, local Initial Studies, and local Draft EIRs. These latter funds will also pay for Fish and Game commenting on counties' Wildlife Habitat Components of their Conservation Elements and on the related Focused Draft EIRs. The State Department of Forestry and Fire Protection will receive two million dollars (\$2,000,000.00) to complete its habitat mapping project for the state.

5. Splitting of parcels that contain Rare Plant Communities, Target Use-Areas or Target Habitats is hereby declared a project under CEQA. These three land types are sensitive areas under CEQA. The conversion of rangelands to croplands or vineyards will require a county grading permit and is hereby declared a project under CEQA, if Rare Plant Communities, Target Habitats, or Target Use-Areas are affected. The harvesting of hardwoods will require a county tree-cutting permit and is hereby declared a project under CEQA if Rare Plant Communities, Target Habitats, or Target Use-Areas are affected.

6. Each county will require mitigation, where feasible, for cumulative impacts on plant communities and wildlife, as well as for direct and indirect impacts from individual projects. Cumulative impacts will be assessed primarily in connection with CEQA evaluations of individual projects under the county's jurisdiction, but also in connection with a group of projects that are proposed in the same area at about the same time. Cumulative impacts will be assessed by identifying the purpose of the assessment and then defining its scope according to the sources of the impact, the re-

sources receiving the impact (target resources) and their geographic area, and the time period of interest. The geographic area will in some cases encompass all of the lands under county jurisdiction. The time period will focus on impacts of present and reasonably foreseeable future projects.

7. Plant and wildlife mitigation measures will be selected according to the following priorities:

a. Whenever possible, mitigation measures will be implemented on or adjacent to the project site and will replace, protect, or improve the same kinds of lands as those lost or damaged by the project. If viability of a protected plant community or habitat is uncertain, then off-site mitigation will be required.

b. Otherwise, mitigation measures will improve the same kinds of habitats as those lost, but at appropriate sites elsewhere, with the preference being for the preservation of large areas or of corridors.

8. Where plant or habitat protection or enhancement measures are to be implemented, a Management Plan shall be required. It shall be prepared in sufficient detail that a qualified biologist could judge its likelihood of success, and it shall include a monitoring program. The county will develop lists of standard mitigation measures for Target Habitats, Target Use-Areas, and Rare Plant Communities. Requirements for monitoring will be explicitly incorporated into the appropriate permit or development agreement, and should include performance standards, corrective measures required if the standards are not met, intervals at which monitoring will be conducted, and responsibilities for conducting and paying for monitoring, as well as corrective measures. Fees, bonds, and trust funds will be required to ensure long-term monitoring. Monitoring will continue for as long as project impacts will occur. If indefinite or ongoing monitoring is required, it shall be funded from interest payments from trust funds.

9. Under certain circumstances, Timberland Preserve Zone (TPZ) zoning may substitute for Open Space zoning and other plant and wildlife mitigation measures, provided a Timber Management Plan is re-

corded as a permanent deed restriction and the Timber Management Plan requires all necessary plant and wildlife mitigation measures. The Timber Management Plan shall be developed in cooperation with the California Department of Forestry and the Department of Fish and Game. The mitigation in the Timber Management Plan and the conditional use permit shall be subject to the mitigation priorities and monitoring requirements set forth herein.

10. For all projects, as defined by CEQA and by each county, the county staff shall conduct a Plant and Wildlife Evaluation to assess the impacts on plants and wildlife and assign appropriate mitigation measures, if required. Mitigation measures shall conform to the above priorities.

Definitions:

Common Habitat: As defined by the statewide Wildlife Habitat Relationships program, administered by the Department of Fish and Game (Mayer and Laudenslayer, 1987).

Common Plant Communities: Plant Communities that are not considered threatened or endangered by the county, the State of California, or the federal government. Species in this category are those that are not considered vulnerable to impacts from development at the present time or in the near future in the county.

Harvest Species: Species that can legally be taken by hunters and fishermen, subject to state regulation.

Rare Plant Communities: Plant Communities considered threatened or endangered by the county, the State of California, or the federal government. Species in this category include any species that deserve special consideration by the county when assessing impacts, developing mitigation measures, and making other planning decisions.

Special Status Species: Species that are legally protected or are of special concern to federal or state agencies, due to their rarity or sensitivity to human disturbance. Species included in this category are animals listed as threatened or endangered by the State of California or the federal government, "candidate" species that are under consideration by the U.S. Fish and Wildlife service for listing, species of "special concern" in California designated by the California Department of Fish and Game, "special animals" listed by the California

Natural Diversity Database, and species designated as "sensitive" by Region 5 of the U.S. Forest Service.

Target Habitat: Habitats that are restricted in acreage in the county and are either (1) important to one or more of the "Target Wildlife Species" or (2) essential to the maintenance of wildlife diversity in the County.

Target Use-Areas: Use-areas of Target Wildlife Species that have a high potential for significant impacts from development. For most threatened and endangered species and other very rare species, all regularly used habitat areas are defined as Target Use-Areas, as impacts to any such areas would be significant. For other rare species, Target Use-Areas include only the more critical use-areas, such as nesting or breeding sites and important roost sites. For more common species, Target Use-Areas are limited to areas of unusually high population density.

Target Wildlife Species: Species that deserve special consideration by the county when assessing impacts, developing mitigation measures, and making other planning decisions. Target Wildlife Species are those for which significant impacts, as defined by CEQA, are most likely to occur within the county. This includes all species listed as threatened or endangered by the federal or state agencies, most other Special Status Species, selected Harvest Species, and any other species that are likely to experience a substantial loss of habitat or substantial interference with their migration due to human impacts.

Wildlife Area: A target habitat or target use-area.